

DOCKET

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Title: Sandra Gardebring, Commissioner of the Minnesota
Department of Human Services, Petitioner
v.
Kathryn Jenkins

Docketed:
December 9, 1986

Court: United States Court of Appeals
for the Eighth Circuit

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Counsel for respondent: Davison, Laurie N.

Entry	Date	Note	Proceedings and Orders
1	Dec 9 1986	G	Petition for writ of certiorari filed.
2	Dec 9 1986		Appendix of petitioner Gardebring, Commr., etc. filed.
3	Jan 7 1987		Brief amici curiae of Hawaii, et al. filed.
4	Jan 8 1987		Brief of respondent Kathryn Jenkins in opposition filed.
5	Jan 14 1987		DISTRIBUTED. February 20, 1987
6	Jan 14 1987		REDISTRIBUTED. February 20, 1987
7	Feb 23 1987	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
8	May 20 1987		Brief amicus curiae of United States filed.
9	May 26 1987		REDISTRIBUTED. June 11, 1987
10	Jun 15 1987		Petition GRANTED. *****
11	Jul 16 1987	G	Motion of respondent for leave to proceed further herein in forma pauperis filed.
13	Jul 18 1987		Order extending time to file brief of petitioner on the merits until August 28, 1987.
14	Jul 22 1987		DISTRIBUTED. Sept. 28, 1987. (Motion of respondent for leave to proceed further herein in forma pauperis).
15	Aug 11 1987		Record filed.
17	Aug 28 1987		Brief amici curiae of Alabama, et al. filed.
19	Aug 28 1987		Brief amicus curiae of United States filed.
16	Aug 31 1987		Brief of petitioner Gardebring, Commr., etc. filed.
18	Aug 31 1987		Joint appendix filed.
20	Sep 11 1987	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Sep 18 1987		Order extending time to file brief of respondent on the merits until October 14, 1987.
23	Oct 5 1987		Motion of respondent for leave to proceed further herein in forma pauperis GRANTED.
24	Oct 5 1987		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
25	Oct 13 1987		Brief amicus curiae of Economics Rights Task Force filed.
26	Oct 14 1987		Brief of respondent Kathryn Jenkins filed.
27	Nov 20 1987		CIRCULATED.
28	Nov 23 1987		SET FOR ARGUMENT. Wednesday, January 13, 1988. (2nd case).
29	Dec 19 1987	X	Reply brief of petitioner Gardebring, Commr., etc. filed.
30	Dec 19 1987		Lodging received.
31	Jan 13 1988		ARGUED.

**PETITION
FOR WRIT OF
CERTIORARI**

86-978

No. _____

Supreme Court, U.S.
FILED

DEC 9 1986

JOSEPH E. SPANIOLO, JR.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

SANDRA GARDEBRING, Commissioner of the
Minnesota Department of Human Services,
Petitioner,

vs.

KATHRYN JENKINS,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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QUESTIONS PRESENTED

1. Does federal law require a State to provide individual written notice detailing the mechanics and precise effect of numerous eligibility requirements for the Aid to Families with Dependent Children ("AFDC") Program to all applicants and recipients at the time of application, periodically thereafter, and whenever eligibility requirements change?
2. Does a program publicity rule promulgated by the United States Department of Health and Human Services delay the implementation of a statutory AFDC change if the state fails to give AFDC recipients advance notice of the change, where Congress specified the effective date of the law and neither made its implementation dependent on advance notice of the change nor gave the federal agency authority to delay the effective date?

LIST OF PARTIES

The parties to the proceeding below:

- (a) Respondent Kathryn Jenkins and three other persons, Sharon Slaughter, Helen Stewart and Jennifer Ayers, were plaintiffs in the district court. The court of appeals noted that the latter three were no longer parties in the court of appeals, although their names continued in the caption. A-7.
- (b) Leonard W. Levine, formerly Commissioner of the Minnesota Department of Human Services, was the defendant in the district court and both appellant and appellee before the circuit court. He has since resigned that office, and was replaced by Petitioner Sandra Gardebring.

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vs.

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Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Petitioner Sandra Gardebring, Commissioner of the Minnesota Department of Human Services, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on September 10, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 801 F.2d 288, and is reprinted at A-1. The memorandum opinions of the district court are reported and reprinted as follows: 598 F.Supp. 1035, A-27; 605 F.Supp. 1242, A-61; 621 F.Supp. 509, A-83; and unreported opinion dated June 13, 1985, A-79.

JURISDICTION

This petition for writ of certiorari seeks review of the judgment of the United States Court of Appeals for the Eighth Circuit entered on September 10, 1986. A-95. Jurisdiction of the Supreme Court is conferred by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 602(a)(17) and (22)

(a) Contents. A State plan for aid and services to needy families with children must—

...
(17) provide that if a child or relative applying for or receiving aid to families with dependent children, or any other person whose need the State considers when determining the income of a family, receives in any month an amount of earned or unearned income which, together with all other income for that month not excluded under paragraph (8), exceeds the State's standard of need applicable to the family of which he is a member—

(A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (8), divided by (ii) the standard of need applicable to such family, and (B) any income remaining (which amount is less than the applicable monthly standard) shall be treated as income received in the first month following the period of ineligibility specified in subparagraph (A);

...
(22) provide that the State agency will promptly take all necessary steps to correct any overpayment or underpayment of aid under the State plan, and, in the case of—

(A) an overpayment to the individual who is a current recipient of such aid (including a current recipient whose overpayment occurred during a prior period of eligibil-

ity), recovery will be made by repayment by the individual or by reducing the amount of any future aid payable to the family of which he is a member[.]

Act of Aug. 13, 1981, Pub. L. No. 97-35, § 2351, 95 Stat. 859

(b) If a State agency administering a plan approved under part A of title IV of the Social Security Act demonstrates, to the satisfaction of the Secretary of Health and Human Services, that it cannot, by reason of State law, comply with the requirements of an amendment made by this chapter to which the effective date specified in subsection (a) applies, the Secretary may prescribe that, in the case of such State, the amendment will become effective beginning with the first month beginning after the close of the first session of such State's legislature ending on or after October 1, 1981. For purposes of the preceding sentence, the term "session of a State's legislature" includes any regular, special, budget, or other session of a state legislature.

45 C.F.R. § 206.10(a)(2)(i) (1985)

(i) Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program, and related services available, and the rights and responsibilities of applicants for and recipients of assistance. Specifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity.

STATEMENT OF THE CASE

This class action challenges the sufficiency of advance notice provided by the Minnesota Department of Human Services ("State") before implementing the Aid to Families with Dependent Children ("AFDC") "lump sum" statute, 42 U.S.C. § 602(a)(17). On September 10, 1986, the Eighth Circuit Court of Appeals affirmed the district court's ruling that the State had failed to give AFDC recipients adequate

advance notice of the lump sum statute under 45 C.F.R. § 206.10(a)(2)(i) (1985) and enjoined the State from applying the statute to the named plaintiff. The district court's jurisdiction was invoked under 28 U.S.C. §§ 1343(3) and 1331 because of the federal questions presented.

AFDC is a federal-state public assistance program established under Title IV-A of the Social Security Act, 42 U.S.C. §§ 601-15 (Supp. 1982). The lump sum statute was one of numerous amendments to AFDC eligibility laws adopted by Congress in the Omnibus Budget Reconciliation Act of 1981 ("OBRA"), Pub. L. No. 97-35, 95 Stat. 357 (1982). OBRA was adopted on August 13, 1981 as a major budget-cutting measure and restricted eligibility for federally funded public assistance programs in many ways. Congress specified that OBRA would become effective on October 1, 1981, or, for states which demonstrated that they could not implement the federal changes consistent with their own state statutes, in the first month after the first state legislative session. In Minnesota, the effective date was February 1, 1982¹.

The 1981 lump sum statute has been subject to extensive litigation around the country and is presently before this court in *Lukhard v. Reed*, cert. granted 106 S. Ct. 3271 (June 23, 1986). The statute makes AFDC recipients who receive non-recurring lump sum income ineligible for a certain number of months calculated by dividing the lump sum and other income by the family's monthly grant amount. Depending on the amount of the lump sum, the recipient can become ineligible for several months. The lump sum statute was enacted because Congress wanted recipients to use their lump sum income, instead of AFDC, to support themselves. See S. Rep. No. 139, 97th Cong. 1st Sess. 754, reprinted in 1981 U.S. Code Cong. & Ad. News 396, 771.

1. Much of OBRA was originally scheduled to go into effect in Minnesota on October 1, 1981. However, subsequent litigation resulted in delayed implementation of the lump sum statute and certain other changes until February 1, 1982, when conforming state legislation was enacted. See *Minnesota Recipients Alliance v. Noot*, 527 F.Supp. 140 (D. Minn.), stay terminated, 676 F.2d 704 (8th Cir. 1981).

As part of OBRA, Congress also mandated that states recover all benefit overpayments made to recipients. 42 U.S.C. § 602(a)(22). By definition, an "overpayment" is an amount of benefits paid to a recipient which is more than the amount for which the recipient is eligible under the AFDC program. 45 C.F.R. § 233.20(a)(13)(i) (1985). States must attempt to recoup every overpayment, even if the overpayment was caused by administrative error and the overpaid recipient acted in good faith. See S. Rep. No. 139, *supra*, at 519, 1981 U.S. Code Cong. & Ad. News at 785; 47 Fed. Reg. 5648, 5672 (Feb. 5, 1982).

When a recipient continues to receive an AFDC grant after receiving a lump sum that would render him or her ineligible, the recipient accrues an overpayment subject to recoupment. This may occur for a number of reasons, including delayed reporting of the lump sum by the recipient. In addition, if a recipient requests an administrative hearing and thus receives continued benefits pending the appeal, he or she must repay the benefits received during the pendency of the appeal if the appeal is unsuccessful. 45 C.F.R. §§ 233.20(a)(13)(i) and 205.10(a)(6)(i) (1985).

On September 18, 1981, soon after the enactment of OBRA, the State sent a two-page letter ("OBRA informational letter") to all then-current AFDC recipients summarizing 19 major changes to be made in the AFDC program. A-97 to A-101. The letter stated, both at its beginning and at its end, that the letter was not intended as a detailed explanation of the changes and that recipients should contact their financial workers for more complete information. The first change described in the letter was the lump sum statute:

Lump Sum Money: When a family receives lump sum money such as an inheritance, a Social Security back payment, insurance settlement, gift, etc., the money will be deducted from the AFDC grant, whether or not it has already been spent. If the lump-sum added to other family income totals more than the AFDC maximum for that size family, the family will be ineligible for that month in which the lump sum was received (and possibly for a number of following months), whether or not the money is

spent before the period of ineligibility has gone by. If the family already received an AFDC grant that month, the grant would be "recouped" by the welfare agency.

A-97-98. The State sent the letter to assist current recipients, even though the State did not believe there was any legal requirement to provide such notice.

Totally apart from any information about statutory changes, the State routinely provides to AFDC applicants pamphlets and information packets which describe the general scope, rights, and requirements of AFDC and other public assistance programs. Because the lump sum rule affects less than two percent of recipients in Minnesota, the State did not include a description of the lump sum rule in these materials prior to this litigation. However, the written materials given to applicants, as well as those provided periodically to recipients, repeatedly advise them to immediately report any change in family composition, employment, income or resources and to request further information from their financial workers. In addition, a detailed AFDC program manual is available to the public in every local welfare office. 45 C.F.R. § 205.70 (1985).

On July 7, 1983, a class of AFDC recipients whose benefits had been reduced or terminated under the lump sum policy brought this lawsuit seeking declaratory and injunctive relief. The original plaintiffs challenged the substantive validity of the federal lump sum provision on several constitutional and statutory grounds.

Respondent Jenkins intervened in the suit on September 7, 1984. Jenkins, who had received the September 18, 1981 OBRA informational letter, received a large lump sum in October 1983. She spent almost the entire lump sum before she contacted her financial worker. When Jenkins did inquire, her worker explained the application of the lump sum provision.

Jenkins claimed that she had spent her lump sum funds before receiving adequate advance notice of the effects of the lump sum statute. She argued that, because the State had failed to give her adequate notice, the lump sum statute should not be applied to her. She requested an order enjoining

the State from recouping overpayments made to her after she had become ineligible because of receipt of the lump sum.

On December 11, 1984, the district court upheld the constitutional and statutory validity of the lump sum provision. A-27. However, the court ruled that 45 C.F.R. § 206.10(a)(2)(i) requires the State to provide all AFDC applicants and recipients with periodic written notice detailing the lump sum statute and its precise effect on recipients. The court found that a recipient familiar with the pre-OBRA policy would be "totally unable to anticipate" the change in the law and could not "be expected to be fully familiar with the Code of Federal Regulations." A-49 and A-50. The court concluded that the State's OBRA informational letter did not adequately explain the lump sum provision.

Finding that the State had failed to satisfy 45 C.F.R. § 206.10(a)(2)(i), the district court ordered two forms of relief. First, the court ordered the State to distribute a two-page notice containing a "thorough explanation of the mechanics" of the lump sum policy to all applicants and recipients at application time and during every six-month re-evaluation period. A-57. The court specifically instructed the State to include examples of the statute's operation in the notice. A-65, A-73 and A-76. Second, the court ordered the State to prepare a class notice, informing the class members that they could apply to the State for retroactive benefits. A-57.

The district court denied the State's motion for reconsideration on April 2, 1985, and the State's motion for a stay pending appeal on June 13, 1985. A-61 and A-79. The State appealed the December 11, 1984 and April 2, 1985 orders to the Eighth Circuit Court of Appeals on May 2, 1985.

Respondents subsequently moved the district court for an order declaring that class members who spent their lump sum income before they were informed of the lump sum policy were entitled to retroactive benefits. Respondent Jenkins requested an order enjoining the State from recouping benefits paid to her during her lump sum ineligibility period. The district court denied respondents' motion for supplemental relief on November 5, 1985. A-83. Respondent Jenkins' appeal from this order was consolidated with the State's appeal.

On September 10, 1986, a panel of the Eighth Circuit Court of Appeals, in a split decision, affirmed the district court's ruling that the State's OBRA informational letter was inadequate. A-1. However, the circuit court reversed the district court's November 5, 1985 decision and enjoined the State from recouping Respondent Jenkins' overpayment. The majority of the court held that "the payments to Jenkins cannot be considered an overpayment, because the defendant, having failed to provide adequate notice to Jenkins of the lump sum rule, cannot properly invoke it against her." A-21. The majority also held that, by failing to comply with the notice regulation, the State "failed to institute a legal change in its eligibility rules." A-21. Judge Fagg dissented, stating that the court "seizes upon a regulation of the Secretary" to require advance written notice before the lump sum statute can be implemented, thus defeating the effective date expressly prescribed by Congress. A-24.

The State now petitions this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE CONCLUSION OF THE COURT BELOW, THAT THE STATE FAILED TO GIVE ADEQUATE ADVANCE NOTICE OF THE AFDC LUMP SUM STATUTE, CONFLICTS WITH THE PRINCIPLES OF PREVIOUS DECISIONS OF THIS COURT AND RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH THIS COURT SHOULD ADDRESS.

The lower court's decision, that states must give advance detailed notice of specific AFDC eligibility statutes before implementing those statutes, and periodic notice thereafter, is without legal basis and threatens the ability of states throughout the country to implement a multitude of rapidly

changing laws governing eligibility for AFDC and other federal-state public assistance programs. The lower court's unprecedented and erroneous interpretation of 45 C.F.R. § 206.10(a)(2)(i) is in conflict with the principles enunciated by this Court in *Atkins v. Parker*, 472 U.S. 115 (1985) and *Lyng v. Payne*, _____ U.S. _____, 106 S. Ct. 2333 (1986), and raises an important issue of federal law which should be settled by this Court.

In *Atkins*, food stamp recipients challenged the adequacy of a notice given by the State of Massachusetts to implement federally mandated cuts in the Food Stamp Program. This Court, reversing the lower court decisions, found that the state's notice complied with due process requirements, as well as applicable statutes and regulations. In rejecting the recipients' due process claims, this Court articulated several principles which refute the lower court's holding that the specific, detailed and periodic notice is necessary to treat public assistance applicants and recipients fairly. Those principles are: first, that "[a]ll citizens are presumptively charged with knowledge of the law;" second, that welfare recipients have "no greater right to advance notice of [a] legislative change . . . than [do] any other voters;" third, that "[t]he entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny;" and finally, that Congress can assume that a recipient will inquire about the effect of a law change if the recipient does not understand it. 472 U.S. at _____, 105 S. Ct. at 2530-31.

The decision of the lower court here ignores the principle, previously applied by this Court in *Atkins* and *Lyng*, that notice and publicity regulations in economic assistance programs should be narrowly construed, and that courts should not read additional requirements into those regulations. As this Court stated, "What judges may consider common sense, sound policy or good administration, however, is not the standard by which one must evaluate the claim that the notice violated the applicable regulations." *Atkins v. Parker*, 472 U.S. at _____, 105 S. Ct. at 2528, n.29. Here, there is no support in the language of the regulation for the lower court's

far-reaching decision. Instead, the lower court simply imposed its own notion of "fair" or "reasonable" notice.²

The regulation at issue, 45 C.F.R. § 206.10(a)(2)(i), states:

Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program, and related services available, and the rights and responsibilities of applicants for and recipients of assistance. Specifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity.

The regulation, which applies to AFDC and several other public assistance programs, requires the State to provide written pamphlets to applicants which generally describe the availability and requirements of the program. The regulation also requires the State to supplement these pamphlets by providing additional, oral, information to those "who inquire." 43 Fed. Reg. 6949, 6950 (Feb. 17, 1978).

The lower court decision required the State to provide specific and detailed notice of the lump sum statute to all current recipients before implementing the statute. The decision also requires the State to periodically (every six months) provide individual written notice to all recipients concerning the lump sum requirement. The notices must set out the mechanics of the lump sum provision, and even provide examples of the statute's operation. A-57 and A-65. See also the court-ordered notice, at A-103 to A-106.

2. It should be noted that this case does not involve individual pre-termination notice. Welfare recipients have a due process right to receive pre-termination notice (and, if requested, appeal hearings) to guard eligible recipients against risk of erroneous termination of benefits. *Goldberg v. Kelly*, 397 U.S. 254 (1970); 45 C.F.R. § 205.10(a)(4)(i). Each person affected by the lump sum statute here received a detailed individual pre-termination notice before the State took any action to terminate benefits. The adequacy of those pre-termination notices has not been challenged.

The court's decision thus imposes several requirements not found in the regulation. First, the regulation's plain language states that it applies only to applicants. Therefore, the court's decision that the regulation required the State to provide any notice to persons who were already recipients when the lump sum statute became effective (including Respondent Jenkins) is clearly wrong. Likewise, the requirement to provide periodic notice to recipients after their initial application is plainly not supported by the rule. Second, the regulation does not require individual written notice, much less periodic notice, of any single eligibility requirement. Finally, the rule does not require that information be provided in the detail required by the court here. There is nothing on the face of the rule which indicates that the State's OBRA informational letter was substantively deficient, or which requires the multitude of specific disclosures and examples contained in the court-imposed notice.

Thus, it is clear that the lower court's decision did not result from the language of the regulation, but rather from the court's own idea of what would constitute reasonable notice. The lower court stated that it would be "truly Kafkaesque" (A-11) to hold an AFDC recipient to the requirements of the law without providing individual advance notice of the law's requirements to the recipient. In striking contrast to the principle of *Atkins* that a recipient may be expected to inquire about the effect of a law, the lower court based its strained and erroneous interpretation of the regulation on the assumption that it is unfair to expect an AFDC recipient who receives a large sum of money to inquire about the effect of the receipt on his or her eligibility before spending the money. Instead of objectively analyzing the language of the regulation, the lower court seized on the regulation as a means to grant relief from a legislative policy the court considered harsh.

The lower court's decision is therefore contrary to the policies of this Court's prior decisions, and thus clearly erroneous. In addition, it will have severe and harmful consequences for the administration of AFDC and other public assistance programs throughout the country.

Neither Minnesota nor any other state can administer the AFDC program in a manner which is fully consistent with the

lower court's decision. To require the State to repeatedly provide the lengthy and detailed notice describing the mechanics of *only* the lump sum provision may not be impractical. However, the premise of the lower court's decision—that the State has an obligation to give all recipients individual written notice detailing specific AFDC eligibility requirements that may affect only a few recipients—reaches far beyond the lump sum statute. There are myriad AFDC eligibility requirements spread over many pages of federal and state regulations which are subject to frequent change as legislative policy shifts at both federal and state levels.³ The lump sum statute was only one of nineteen OBRA changes described in the State's OBRA informational letter. The precedent established by the lower court's decision could require the State to provide an AFDC "program operations manual," containing a description of the operation and effect of all AFDC eligibility requirements, complete with examples, to every recipient and applicant at least every six months, and additionally whenever any eligibility provision changes.

The lower court attempted to justify its far-reaching decision by characterizing the lump sum policy as unique, in that a recipient may plan for the effects of the policy if he or she understands its operation at the time the lump sum payment is received. A-10-11. But the lump sum rule shares this "planning" element with many other eligibility requirements. For example, if an eighteen-year old drops out of school, the child (and perhaps the caretaker as well) will become ineligible. 45 C.F.R. § 233.90(b)(3) (1985). If a recipient marries, the new stepparent's income is presumed available to the rest of the family and may result in the family's ineligibility. 45 C.F.R. § 233.20(a)(3)(xiv) (1985). The family will probably lose eligibility if an absent parent moves back home. 45 C.F.R. § 233.90(c)(iii) (1985). If a parent gives a daughter a car worth

3. For example, 45 C.F.R., pt. 233, containing eligibility requirements for AFDC, covers 40 pages of the Code of Federal Regulations. Other federal eligibility requirements are contained in 45 C.F.R. pts. 205, 206, 224, and 232. Minnesota's recently revised AFDC rule is more than 120 typed pages.

more than \$1,500, she and her children will lose eligibility even if she tries to give it back. 45 C.F.R. § 233.20(a)(3)(i)(B)(2) (1985). If a recipient works more than 100 hours two months in a row, or turns down a job, or participates in a strike, the family may become ineligible. 45 C.F.R. § 233.100(a) (1985). As with the lump sum provision, the adverse impact of each of these eligibility requirements can be avoided through advance planning. Thus, it is doubtful that the precedential effects of the lower court's decision will be limited to the lump sum provision.

Furthermore, the lower court's decision fails to articulate any standards for judging the adequacy of advance notice. It can always be argued, after the fact, that notice could have been better. Under the precedent established by the lower court's decision, administrative agencies charged with implementing complex legislative policies will constantly face the unpredictable threat of reversal under "this vague injunction to employ the 'best' procedures." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546-47 (1978).

This unrestrained judicial second-guessing presents perhaps the most harmful consequence of the lower court's decision. When combined with the court's remedy for inadequate notice—that the State's attempt to implement the policy is retroactively invalidated years after the fact (*see* Part II, below)—this hindsight frustrates the implementation of Congress' mandate. Despite the best efforts of the State to comply with any applicable notice requirement, the court may later find the notice too general and uninformative, or too detailed and complex to understand, and retroactively enjoin the State's implementation of the law.

This Court, therefore, should review and reverse the lower court's decision. That decision is contrary to the principles of this Court's decisions. If allowed to stand, it will have severe effects on the implementation of AFDC and other federal-state benefit programs throughout the country.

II.

THE LOWER COURT'S DECISION, THAT THE STATE COULD NOT IMPLEMENT THE LUMP SUM STATUTE UNTIL IT HAD GIVEN NOTICE OF THE LAW CHANGE, CONTRADICTS THE DIRECT MANDATE OF CONGRESS AND RAISES AN IMPORTANT ISSUE OF LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The Court of Appeals enjoined the State from applying the lump sum statute to Respondent Jenkins because the court concluded she had not been given adequate advance notice of the statute. This holding contradicts express Congressional directives in two respects and thus raises a serious question of law which should be reviewed by this Court. First, Congress clearly and affirmatively established the effective date of the lump sum statute without any suggestion that it intended to condition that date on advance notice to recipients. Second, Congress mandated that a state recover from a recipient any overpayment of benefits, that is, any amount paid to the recipient which exceeded the amount the recipient should have received under federal law. By holding that Minnesota did not legally implement the lump sum change on February 1, 1982 and by enjoining the State from recouping Respondent Jenkins' overpayment, the court below improperly relied on its reading of an administrative regulation to defeat the clear policy decisions made by Congress.

In enacting OBRA in 1981, Congress made far-reaching cuts in AFDC and other federally funded public assistance programs.⁴ In order to tighten eligibility requirements and reduce program expenditures, Congress substantially amended the AFDC statute. To achieve the intended cost savings, Congress mandated that the changes be implemented promptly. Thus, the required effective date for Minnesota was February 1, 1982.

Under the lower court's decision, the lump sum statute did not become effective in Minnesota on February 1, 1982 as

4. *Atkins* concerned an amendment to the Food Stamp Act which was also part of Congress' 1981 public assistance benefit cuts.

directed by Congress, but instead became effective more than three years later. The court said:

[T]he payments to Jenkins cannot be considered an overpayment, because the defendant, having failed to provide adequate notice to Jenkins of the lump-sum rule, cannot properly invoke it against her. *By failing to comply with the notice regulation, DPW failed to institute a legal change in its eligibility rules. See Kimble v. Solomon*, 599 F.2d 599, 604 (4th Cir.), *cert. denied*, 444 U.S. 950 (1979). Jenkins' case must be governed by the prior policy toward lump sums, and under that policy she was eligible for most or all of the benefits the defendant wishes to recoup.

A-21. (Emphasis added.)

That the Court of Appeals nullified the effective date specified by Congress is clear. In his vigorous dissent from the lower court's decision, Judge Fagg said:

Thus, as applied to Minnesota, Congress provided that the 1981 amendment to the lump-sum rule "will" become effective on February 1, 1982.

Conspicuously absent from the Act was any suggestion that in addition to this explicit effectiveness date Congress intended to include the implicit qualification that the implementation of the amendment hinged decisively on the state providing applicants and recipients alike with "appropriate" advance written notice of the amendment's pending implementation. . . .

. . . [E]ven accepting the court's conclusion that the regulation can be read to require advance written notice prior to implementation, such a reading is, in my view, inconsistent with Congress's express statement that the amendment "will become effective" in Minnesota on February 1, 1982. To that extent, the regulation cannot be enforced. Congress could itself have required advance written notice or left the implementation of the amendment entirely to the Secretary. It did not do so but rather specifically determined the date on which the amend-

ment would become fully effective. We have no choice but to respect that decision.

A-24-25. See also *Lyng v. Payne*, 106 S. Ct. at 2341 ("An administrative agency's power is no greater than that delegated to it by Congress").

In addition, by permitting Respondent Jenkins to keep benefits for which Congress specifically made her ineligible, the court below ignored Congressional directives regarding recoupment of overpayments. The OBRA amendments directed the recoupment of all overpayments made to ineligible recipients. 42 U.S.C. § 602(a)(22). As noted above, a recipient who receives a lump sum greater than AFDC income limits is ineligible for AFDC. 45 C.F.R. § 233.20(a)(13)(i). If the recipient continues to receive AFDC benefits after receipt of such a lump sum, the benefits paid constitute overpayments, and must be recouped whether they are paid as a result of recipient error or agency error. 47 Fed. Reg. at 5672.

Because the lower court's order enjoining the State from recouping Respondent Jenkins' overpayments has no basis in law, it is an impermissible exercise of the court's equitable powers. See *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15-16 (1971). Respondent Jenkins had no constitutional right to advance notice. *Atkins v. Parker*, 472 U.S. at _____, 105 S. Ct. at 2530; *United States v. Locke*, 471 U.S. 84 (1985). Nor did the lower court cite any other basis in statute or regulation for the proposition that lack of adequate advance notice of the statutory changes would prevent recoupment of overpayments to recipients.⁵

5. In effect, the lower court's order estopped the state from enforcing the lump sum and overpayment statutes. However, the lower court's decision cannot be justified on a theory of equitable estoppel. This Court has repeatedly held that the government may not be estopped based on a failure to fully publicize statutory requirements. See *Lyng v. Payne*, *supra*; *Heckler v. Community Health Care Services of Crawford County*, 467 U.S. 51 (1984); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).

The lower court cited *Buckhanon v. Percy*, 533 F.Supp. 822 (E.D. Wis. 1982), *aff'd*, 708 F.2d 1209 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984) and *Kimble v. Solomon*, 599 F.2d 599 (4th Cir.), *cert. denied*, 444

The implications of the court's holding, that the State cannot legally effectuate a Congressionally mandated eligibility requirement if it fails to give recipients advance notice, are enormous. Those far-reaching effects are well illustrated by this case. Respondents, attempting to defeat or postpone Congress' 1981 public assistance program changes, attacked the adequacy of the State's pre-implementation notice more than a year after the statute's effective date in Minnesota. Three years after the attempted implementation by the State, the federal court held that the advance notice was inadequate and therefore retroactively held that the lump sum amendment was not effective on the date prescribed by Congress. Recipients may thus turn the notice issue into a weapon for delaying or defeating the implementation of countless legislative judgments about AFDC eligibility. If the lower court's order is allowed to stand, it will seriously disrupt the ability of states to implement changes in federal law in a timely, predictable and final manner.

U.S. 950 (1979) as support for its order enjoining recoupment of overpayments. However, these cases are inapposite. *Buckhanon* concerned the right of recipients to receive continued benefits pending notice and an opportunity for a hearing upon termination of benefits. *Kimble*, a Medicaid case, also involved pretermination notice. Neither case concerns the state agency's obligation, as here, to recover AFDC overpayments made to recipients finally determined ineligible for benefits after notice and hearing.

CONCLUSION

The questions presented here are important both to the states and to the administration of federal-state public assistance programs. The lower court's decision has departed from the principles of this Court's decisions. For these reasons, the State respectfully requests that this petition for a writ of certiorari be granted.

December, 1986

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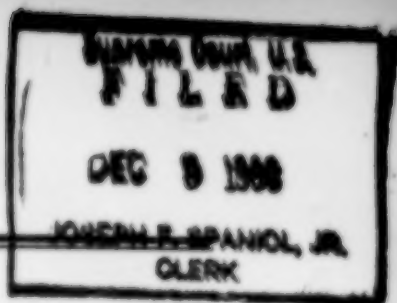
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APPENDIX

86-978 (2)



No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

SANDRA GARDEBRING, Commissioner of the
Minnesota Department of Human Services,
Petitioner,

vs.

KATHRYN JENKINS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

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**United States Court of Appeals
FOR THE EIGHTH CIRCUIT**

Nos. 85-5143, 85-5437

Sharon Slaughter on behalf
of herself and her minor
child, Toni Slaughter; Helen
Stewart; Jennifer Ayers;
and Kathryn Jenkins,
Appellees,

On Appeal from the United
States District Court for the
District of Minnesota.

v.

Leonard Levine, in his
capacity as Commissioner
of the Minnesota
Department of Public
Welfare,

Appellant.

Submitted: February 13, 1986
Filed: September 10, 1986

Before ARNOLD, Circuit Judge, TIMBERS,* Senior Circuit
Judge, and FAGG, Circuit Judge.

ARNOLD, Circuit Judge.

This is a class action challenging several aspects of the Minnesota Department of Public Welfare's treatment of "lump-sum" income in administering the jointly funded federal-state Aid to Families with Dependent Children (AFDC) program established by the Social Security Act, 42 U.S.C. § 601 *et seq.* The defendant, Leonard Levine, who was sued in his capacity as Commissioner of the Minnesota Department of Public Welfare (DPW), raises two issues on

*The Hon. William H. Timbers, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

appeal: whether the District Court¹ erred in holding that the defendant failed to give advance notice of its changed lump-sum policy as required by federal regulations, and whether the District Court's order that the defendant provide plaintiff-class members with notice relief similar to that in *Quern v. Jordan*, 440 U.S. 332 (1979), is inappropriate here or in conflict with the state sovereign immunity established by the Eleventh Amendment. Named plaintiff Kathryn Jenkins also appeals, arguing that the District Court erred in considering itself barred by the Eleventh Amendment from enjoining the defendant from recouping payments made to Jenkins that were inconsistent with the new lump-sum rule.

We affirm the District Court's decision that the defendant failed to provide advance notice of the changed lump-sum policy adequate to meet federal requirements. We conclude that defendant Levine's arguments concerning *Quern* notice have been in part rendered moot while this appeal was pending, and that, to the extent that they are not moot, they are without merit. Finally, we agree with Kathryn Jenkins that the injunctive relief she seeks does not violate the Eleventh Amendment.

I. BACKGROUND

A. The Lump-Sum Rule

Lump-sum income is income from a non-recurring source, such as a gift, inheritance, or, in some cases, an insurance settlement. 45 C.F.R. § 233.20(3)(a)(ii)(F); DPW Instructional Bulletin #82-3, Attachment 13. Generally, the amount of money to which a family is entitled under the AFDC program is determined by deducting the family's income, if any, from a state-determined standard of need for a family of its size. Until 1981, when an AFDC recipient received a lump sum that caused the recipient's income to exceed his or her standard of need, the recipient was ineligible for benefits in the month of receipt. However, as soon thereafter as the lump

1. The Hon. Harry H. MacLaughlin, United States District Judge for the District of Minnesota.

sum was exhausted, it was no longer considered available income, and the recipient again became eligible for benefits.

Then, in the Omnibus Budget Reconciliation Act of 1981 (OBRA), Congress, concerned that this practice did not encourage AFDC beneficiaries to use lump-sum income on ordinary living expenses, amended the Social Security Act to require participating states to adopt a stricter lump-sum policy. See Report on the Committee on the Budget, S. Rep. No. 97-139, 97th Cong., 1st Sess, 505 (1981), *reprinted in* 1981 U.S. Code Cong. & Admin. News 396, 771; *Faught v. Heckler*, 736 F.2d 1235, 1236-1237 (8th Cir. 1984). The amendment provided that a lump-sum payment to an AFDC recipient would be considered income available to the recipient for the month of receipt and for a specific number of succeeding months, rendering the recipient ineligible for those months. 42 U.S.C. §602(a)(17). The total number of months of ineligibility is calculated by dividing the lump sum by the recipient's standard of need. *Id.*; 45 C.F.R. § 233.20(a)(3)(ii)(F).² For example, if a family with a \$500 per month standard of need received a \$2,000 lump sum, and no other countable income, it would be ineligible for AFDC benefits for four months.

2. As amended in 1981, the statute stated in pertinent part:

A State plan for aid and services to needy families with children must— . . .

provide that if a person specified in paragraph (8) (A) (i) or (ii), receives in any month an amount of income which, together with all other income for that month not excluded under paragraph (8), exceeds the State's standard of need applicable to the family of which he is a member—

(A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (8), divided by (ii) the standard of need applicable to such family, and

(B) any income remaining (which amount is less than the applicable monthly standard) shall be treated as income received in the first month following the period of ineligibility specified in subparagraph (A) [.]

42 U.S.C. §602 (a) (17).

Through this mechanism Congress hoped to force recipients to use their lump sum in the same manner as they would have used AFDC Benefits.³

DPW responded to the 1981 amendment by adopting the lump-sum policy challenged here. On September 18, 1981, DPW sent a letter outlining the new lump-sum policy and other changes wrought by OBRA to persons then receiving AFDC. The letter indicated that the lump-sum rule would go into effect on October 1, 1981; however, as a result of litigation, the rule did not actually become effective until February 1, 1982. DPW adopted a policy of providing AFDC applicants and recipients an oral explanation of the lump-sum rule when they reported receipt of a lump sum or when their circumstances indicated that receipt of a lump sum was likely.

In 1984, Congress again amended 42 U.S.C. § 602(a)(17), giving states the option of recalculating the period of ineligibility caused by receipt of a lump sum in three situations: where an event occurs during a month of ineligibility that, had the family been receiving benefits, would have changed the amount of aid payable that month (e.g., the state standard of need increases); where the income has become unavailable for reasons beyond the family's control (e.g., theft of the lump sum); and where the family incurs medical expenses. Pub. L. No. 98-396, §2632 (a), 98 Stat. 494, 1141 (1984). DPW has exercised this option, effective August 1985.

3. HHS's regulations implementing the statutory change provided a narrow exception to application of the new lump-sum formula in "life-threatening circumstances." The regulation stated:

A State may shorten the period of ineligibility where it finds that a life-threatening circumstance exists, and the non-recurring income causing the period of ineligibility has been or will be expended in connection with the life-threatening circumstance. Further, until that time the non-recurring income must have been used to meet essential needs and currently the assistance unit must have no other income or resources sufficient to meet the life-threatening circumstance.

45 C.F.R. §233.20(a) (3) (ii) (D) (1982). The regulation was replaced when Congress enacted the 1984 amendments to 42 U.S.C. §602 (a) (17) discussed *infra*, p. 5.

B. District Court Proceedings

The plaintiffs filed this action in July 1983. They challenged both the substance of the lump-sum rule and the adequacy of the defendant's advance notice of the rule. Defendant Levine filed a third-party complaint against Margaret Heckler, Secretary of the United States Department of Health and Human Services (HHS), claiming that HHS's lump-sum regulations are partially invalid but that DPW was constrained to comply with them or forfeit federal funding.

On December 11, 1984, the District Court ruled in the plaintiffs' motion for class certification and the parties' cross-motions for summary judgment. 598 F. Supp. 1035 (D. Minn. 1984). The Court certified a plaintiff class consisting of individuals in Minnesota otherwise eligible for AFDC who had been or would be found ineligible for AFDC for a set number of months under the lump-sum rule, and whose lump sum had or would become unavailable before their ineligibility expired. *Id.* at 1041. Turning to the summary-judgment motions, the Court first rejected the plaintiffs' claim that the new lump-sum policy violated the Social Security Act, specifically 42 U.S.C. §602(a)(7),⁴ because under it DPW presumed that a lump sum was available to the recipient for a predetermined number of months, rather than considering whether the lump sum was actually available to the recipient. The District Court concluded that when Congress enacted the 1981 amendment, it had determined to depart from the general practice of considering only available income; it decided to force AFDC recipients to budget their lump sum for

4. Section 602 (a) (7) (A) provides that state agencies:

shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid[.]

This provision has been interpreted to require that states consider only income and resources actually available to the family. See, e.g., *Jamroz v. Blum*, 509 F. Supp. 953, 959 (N.D.N.Y. 1981). The plaintiffs argued that §602 (a) (17) must be read in conjunction with §602 (a) (7) to require that the lump sum actually be available to the recipient.

use on necessary living expenses by requiring that the lump sum be considered available whether or not it is expended before the ineligibility period expires. 598 F. Supp. at 1049. The District Court further held that the plaintiffs' other challenges to the substance of the lump-sum rule, based on the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments, were also without merit. *Id.* at 1052-55.⁵

However, the District Court agreed with the plaintiffs that the defendant had failed to provide adequate notice of the lump-sum rule, violating 45 C.F.R. §206.10(a)(2)(i). The Court interpreted this regulation to require advance written notice to AFDC recipients of the lump-sum rule's operation. The District Court concluded that the defendant's only written notice of the rule, its September 18, 1981 letter, did not provide adequate notice of the new policy even to those who received it. It found the defendant's failure to comply with the regulation even more clearly established for class members who were not AFDC recipients in September 1981, and who had therefore received no written notice of the lump-sum policy. 598 F. Supp. at 1049-1052.⁶

As a remedy for these violations, the District Court ordered the defendant to provide two kinds of notice relief. First, the defendant was ordered to mail current AFDC recipients "publicity" notices explaining the mechanics of the lump-sum rule, and to include this explanation in the information provided AFDC applicants and in the materials given recipients at their semi-annual reevaluations. 598 F. Supp. at 1055. Second, the District Court, citing *Quern v. Jordan*, 440 U.S. §332 (1979), ordered Levine to mail notices to class members whose benefits had been terminated under the lump-sum rule and in violation of the federal notice regulation to inform them of the result of the federal litigation and to inform them

5. The plaintiffs have not appealed the District Court's adverse holdings on their claims concerning the substance of the lump-sum rule.

6. Having accepted the plaintiffs' claim that the defendant failed to provide notice required by federal regulation, the District Court did not reach the plaintiffs' constitutional challenge to the adequacy of the State's notice to recipients.

that they could apply to DPW for corrective payments. 598 F. Supp. at 1055.

On April 11, 1985, the District Court issued a second opinion, responding to motions by the defendant for reconsideration of its earlier opinion and order. 605 F. Supp. 1242 (D. Minn. 1985). Levine contended that Kathryn Jenkins, the only named plaintiff argued to have standing to raise the publicity-notice issue,⁷ did not in fact have such standing because she had received DPW's September 1981 letter. 605 F. Supp. at 1246-1247. The District Court reiterated its position that 45 C.F.R. §206.10(a)(2)(i) required advance written notice of the new policy, and its conclusion that *Quern* notice relief was proper and consistent with Eleventh Amendment requirements. 605 F. Supp. at 1247-1249. Finally, the District Court granted Levine's motion for reconsideration in one respect: the Court ordered HHS, the third-party defendant, to pay the federal share of any benefits paid to class members as a result of the Court's decision. *Id.* at 1249-1250.⁸

In May 1985, Levine appealed to this Court and moved the District Court to stay the portion of its December 10 and April 11 orders concerning *Quern* notice relief. The District Court denied this motion in June 1985. Civ. No. 4-83-579 (D. Minn. June 13, 1985). The State did not request a stay from this Court.

The District Court issued a fourth opinion in November 1985, this time ruling on the plaintiffs' motions for contempt and for supplemental relief. 621 F. Supp. 509 (D. Minn. 1985).

7. There were three named plaintiffs in the suit: Sharon Slaughter, Helen Stewart, and Kathryn Jenkins. Sharon Slaughter, the original named plaintiff, accepted a settlement and dropped out of the suit before the District Court issued its first opinion. 598 F. Supp. at 1039 n.2. Helen Stewart lacked standing to raise the notice issue because she did not expend any of her lump sum until *after* she was fully informed of the lump-sum policy by her caseworker. 598 F. Supp. at 1043; 605 F. Supp. at 1245 n.3. (A fourth plaintiff, Jennifer Ayers, also intervened in the suit, but apparently was no longer a participant when the District Court issued its first opinion.)

8. The Secretary of HHS filed an appeal of this portion of the District Court's order, but subsequently withdrew it. Consequently, HHS did not participate in any fashion on this appeal.

The District Court refused to cite Levine for contempt, but ordered modifications in the DPW-prepared lump-sum rule publicity notices and *Quern* notices, upholding objections made by the plaintiffs. *Id.* at 511-513, 514-515. The District Court also refused on Eleventh Amendment grounds to declare that class members who spent their lump sum before receiving notification of the new rule are entitled to corrective payments from DPW. *Id.* at 515. Lastly, the Court denied Kathryn Jenkins's request that it order the defendant to cease efforts to recoup AFDC benefits paid her during her lump-sum rule ineligibility period. Jenkins's AFDC benefits were continued by DPW during this period pending Jenkins's administrative appeal of her termination under the lump-sum rule. *Id.* at 513-514. Levine characterizes these payments as "over-payments" caused by agency error, and seeks to recoup them by withholding one per cent of Jenkins's AFDC benefits each month. See Minn. Stat. §256.73, subd. 6. The District Court refused to enjoin this recoupment because it believed that to do so would violate the Eleventh Amendment. 621 F. Supp. at 513-514. Jenkins's appeal from this order was consolidated with Levine's appeal.

II. NOTICE OF THE LUMP-SUM RULE

Defendant Levine contends that advance written notice of the lump-sum rule was not required by federal regulation. Levine further argues that even if some written notice were necessary, DPW's September 18, 1981 letter fulfilled this requirement. We disagree with the defendant on both points.

A. Advance Written Notice

The regulation interpreted by the District Court to require advance written notice states:

Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information *in written form, and orally as appropriate* about coverage, conditions of eligibility, scope of the program, and related services available, and the rights and responsibilities of applicants for and recipients of

assistance. Specifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity.

45 C.F.R. §206.10(a)(2)(i). (Emphasis added). It is not disputed that this regulation applies to the lump-sum rule, since the rule clearly involves a "condition of eligibility." Instead, the issue here is what sort of notice the regulation mandates, and, as the District Court correctly observed, the few cases that discuss 45 C.F.R. §206.10(a)(2)(i) provide little guidance on this point. See 598 F. Supp. at 1050 and cases cited therein.

Levine's position is that the notice regulation is satisfied by DPW's policy of informing an AFDC recipient of the lump-sum rule and its operation when the recipient reports receiving or appears likely to receive a lump sum. He characterizes the language of the notice regulation as "quite general," maintaining that its purpose is to inform new applicants of the availability of the AFDC program. Appellant's Brief at 24. The new lump-sum rule, the defendant concludes, presents a case in which oral notice is "appropriate," and in which written notice is therefore unnecessary.⁹

We begin our consideration of the question by noting that, as the District Court observed, 605 F. Supp. at 1247, the language of the regulation seems plainly to require written notice in all cases. The regulation states that individuals are to be provided information "in written form, *and orally as appropriate*" (emphasis added), *not*, as defendant Levine seems to argue, "in written form *or orally as appropriate*." The regulation on its face contemplates that in appropriate cases oral notice will be given as a supplement to written notice, not that it represents an alternative to written notice. *Id.*

9. The defendant has also argued that requiring advance written notice of the rule is inconsistent with *Atkins v. Parker*, 105 S. Ct. 2520 (1985). However, the question in *Atkins* was whether *due process* required advance written notice to individual foodstamp recipients of the specific impact of a statutory change on them. Here the District Court declined to reach the plaintiffs' constitutional claims concerning notice, and relied solely on 45 C.F.R. §206.10(a)(2)(i) as the source of a notice requirement. 598 F. Supp. at 1049. *Atkins* is consequently inapposite.

Even were it true that oral notice may replace written notice in appropriate cases, we agree with the District Court that, if the notice regulation is to serve its purpose, the oral notice provided by the defendant cannot be considered "appropriate" notice.

We think it crucial that AFDC recipients receive some form of advance notice of the changed policy towards lump sums and its operation.¹⁰ Without advance notice, an AFDC beneficiary is unlikely to budget a lump sum according to the new rule's rigid formula. AFDC recipients live at a subsistence level; they are likely to have unpaid bills and basic needs not entirely met by AFDC. Thus, an AFDC recipient faces considerable pressure to make use of a lump sum as soon as it is received. 598 F. Supp. at 1051. In addition, it is important to remember that before the new rule was adopted, lump-sum recipients could reapply for benefits as soon as their lump sum was exhausted. Thus, a lump-sum recipient without notice of the new rule is very likely to spend most or all of a lump sum before learning of the rule's strict budgeting requirements, particularly when the recipient is familiar with the prior policy.¹¹ Consequently, the net result of failing to give ade-

10. It appears that the Secretary of HHS agrees that the regulation requires such advance notice to AFDC recipients. In her response to interrogatories posed by the defendant, she states that under 45 C.F.R. §206.10 (a) (2) (i), states must provide applicants and recipients with notice "in written form, and orally as appropriate," about the general content of the rule, including their obligation to report receipt of a lump sum, the operation of the lump-sum rule, and its effect on their eligibility for benefits. A-102. She goes on to contrast this notice with notice of the specific impact of the rule upon a lump-sum recipient, which, she stresses, need not be given until the State acts to terminate or reduce the recipient's benefits. *Id.*

11. Kathryn Jenkins's case illustrates this problem. Jenkins's family had on several occasions received lump sums that were treated in accordance with the old rule. Then, on October 31, 1983, Jenkins's husband received a \$5,752.00 social security disability check. That same day he wrote a \$3,863.75 check to make up the arrearage on the family's home mortgage, which was about to be foreclosed, and a \$1,366 check to pay an overdue car-repair bill. The family spent \$500 to \$600 on other bills and children's clothing. Jenkins did not learn about the new lump-sum rule's budgeting requirements until she reported the disability check to

quate advance notice of the new lump-sum rule is to frustrate the very goal Congress sought to further in enacting the rule: encouraging recipients to budget lump sums so that they serve to replace the family's monthly AFDC check.

The importance of advance notice is heightened by the fact that the effects of the lump-sum rule on an AFDC recipient can be peculiarly drastic. In general, the AFDC program's income- and asset-related eligibility requirements reduce or cut off eligibility only if the resource is actually available to the recipient. However, the new lump-sum rule diverges from the norm, cutting off eligibility without regard, except in very limited circumstances,¹² to whether the lump sum is actually available. Thus, under the operation of most eligibility requirements, there is no point at which a family will not have either the basic support provided by the AFDC program or other financial resources that equal or surpass the AFDC standard of need. In contrast, under the lump-sum rule, where a family exhausts its lump sum before its ineligibility period expires, the family may well be left for months with insufficient resources to provide for basic necessities. To impose this situation on a family that had no advance notice of the new lump-sum rule and operated on the altogether reasonable assumption that the old policy still governed would be truly Kafkaesque.¹³

welfare authorities two days after receiving it; by this time the money was all but exhausted. Under the lump-sum rule, the disability check rendered her family ineligible for AFDC benefits from October 1983 through May 1984. 598 F. Supp. at 1040, 1050.

12. Originally, the only exception was the "life-threatening" circumstances exception, *supra* n.3, which was later replaced by the three exceptions that the 1984 amendments authorize the states to recognize, exceptions that did not become effective in Minnesota until August 1985. See *supra* p. 5.

13. The District Court noted another way in which the new rule may have drastic consequences for recipients, pointing out that by becoming ineligible for AFDC, a family may also lose benefits under other assistance programs as well. 598 F. Supp. at 1052 & n.15. For example, medical assistance benefits are automatically supplied to AFDC recipients, Minn. Stat. §256B.06 (3). Thus even a family that budgets its lump sum may actually be forced to live on less money each month than it would have had if it had not received a lump sum.

We are therefore of the view that it is not "appropriate" within the meaning of 45 C.F.R. §206.10(a)(2)(i) to adopt a notice policy that does not inform recipients in advance of the new lump-sum rule and its operation. We turn to consider whether the oral-notice practices advocated by defendant Levine measure up to this concern. DPW's policy is not to provide all recipients with advance oral notice of the rule, but is instead to give oral notice only to individuals who report receiving a lump sum or who appear likely to their caseworker to receive a lump sum. There are, as the District Court observed, 605 F. Supp. at 1247-1248, several deficiencies in this policy. First, 45 C.F.R. §206.10(a)(2)(i) requires uniform dissemination of eligibility information to all recipients, rather than permitting notice only to recipients believed by their caseworker to need the information. Second, DPW's oral-notice policies do not reasonably assure that an AFDC recipient who gets a lump sum will have advance notice of the rule. While recipients deemed likely to receive a lump sum may receive advance notice of the rule, it is not always possible for the recipient or his or her caseworker to anticipate the receipt of a lump sum. Even a highly competent caseworker may wrongly determine that receipt of a lump sum is not likely, forget to provide notice of the rule, or be tardy in doing so. Therefore, it is not surprising that some recipients are not advised of the new rule until they report their lump sum, or, in some instances, until they receive a termination-of-benefits notice. See 598 F. Supp. at 1050. As demonstrated above, notice provided at either of these points will likely come too late.¹⁴ Finally, we also share the District Court's concern that "oral notice would be very hard to prove or disprove." 605 F. Supp. at 1247.

Levine rejoins that face-to-face oral explanations are a more effective means of communicating information about technical AFDC requirements than are written explanations. This may well be true, but it does not speak to the problem of

14. This is particularly troublesome because AFDC recipients are not required to report income until the eighth day of the following month, and then need not do so orally, but may instead submit a written report. See DPW Brochure "Monthly Reporting," A-68.

lump-sum recipients who receive no advance oral notice under DPW's policy. Therefore, this is at best an argument that general written notice of the rule should be supplemented by the oral notice provided under DPW's policy, or, alternatively, that every recipient should be contacted by DPW and provided with advance oral notice. The latter alternative would prove a far greater strain on administrative resources than would advance written notice, and the defendant would likely find it correspondingly less appealing.

Indeed, defendant Levine argues that to require written notice here will impose an administratively unworkable requirement on DPW. The defendant contends that because the lump-sum rule and other eligibility rules are highly susceptible to change, it will be forced, under the District Court's ruling, to issue a steady stream of written notices. He adds that numerous eligibility rules, including the lump-sum rule, actually wind up affecting relatively small numbers of people. However, the Secretary of HHS, during a notice and comment period on 45 C.F.R. §206.10(a)(2)(i) in 1978, rejected an administrative inconvenience argument like the defendant's stating:

Although eligibility conditions change as a result of change in law, it is expected that even as instructional material is made available to agency staff regarding program eligibility changes, an informational flyer could also be prepared for public dissemination.

43 Fed. Reg. 6950 (February 17, 1978), cited in 598 F. Supp. at 1051 n.13. We therefore conclude that when the notice regulation was adopted, the balance between administrative convenience and AFDC recipients' need for notice was struck in favor of providing notice.

Levine also argues that his belief that the notice regulation does not require written notice here is supported by the Secretary of HHS's responses to interrogatories posed to her by the defendant during this case. However, in none of her answers did the Secretary state that written notice is unnecessary, or that it is not necessary to provide all recipients with

advance information about the lump-sum rule.¹⁵ The Secretary did say that a state may elect to inform AFDC applicants and recipients of eligibility through methods other than "specially developed pamphlets or bulletins," A-105, but did not say that alternative forms of notice need not be written. Moreover, even were we to read the Secretary's answers to indicate that written notice is unnecessary, we would for a combination of reasons be unable to accept her view. First, because her statements concerning the regulation were made in the course of this litigation, rather than some more neutral setting (e.g., in the course of rule-making), we believe her interpretation would be entitled to relatively less deference. Additionally, such an interpretation conflicts with the plain language of the rule, and would deprive the rule of much of its significance in this context, *supra* pp. 11-15.

In short, we agree with the District Court that 45 C.F.R. §206.10(a)(2)(i) by its terms requires advance written notice and admits of oral notice only as a supplement, and that, if this notice regulation is to serve its purpose fully, it must require effective written notice to all AFDC recipients and applicants of the lump-sum rule, a rule which requires advance notice to achieve its underlying purpose and which can have drastic consequences for those to whom it is applied.

B. The September 1981 Letter

Defendant Levine asserts that DPW provided adequate advance written notice of the lump-sum rule when it mailed AFDC recipients its September 18, 1981 letter. The letter, which discussed 19 changes in the AFDC program resulting from OBRA, contained a paragraph discussing the new lump-sum rule.

As the District Court pointed out, 598 F. Supp. at 1050, members of the plaintiff class who were not on the welfare rolls when this letter was sent out did not receive it or any other written notice of the lump-sum rule. For these class members, it is clear without further inquiry that the defendant

15. Indeed, as explained *supra* n. 10, the Secretary's responses indicate that recipients should be given advance notice of the new rule and its operation. See A-102.

failed to fulfill his notice obligations under 45 C.F.R. §206.10(a)(2)(i). The question, then, is whether the September 1981 letter provided the requisite notice to those class members who were AFDC recipients when the letter was mailed. We share the District Court's view that the letter was "incomplete and confusing," and therefore inadequate. 605 F. Supp. at 1246.

There are several deficiencies in the notice provided by the letter. First, the most important, the letter did not adequately explain the mechanics of the lump-sum rule and their inflexible operation. The letter states that under the new rule, where a family receives a lump sum that causes its income to exceed the relevant AFDC limit,

the family will be ineligible for the month in which the lump sum was received (and possibly for a number of following months), whether or not the money is spent before the period of ineligibility has gone by.¹⁶

A-69.

This description, in stating that the lump sum may "possibly" render the recipient ineligible for a number of months in addition to the month of receipt, provides no indication of how strict and inexorable the rule's budgeting requirements are. The recipient is not advised of the chief feature of the rule — that it allows him or her little leeway to use a lump sum as anything other than a replacement for monthly AFDC benefits, since it imposes ineligibility for a predetermined period

16. The full text of the paragraph discussing the lump-sum rule is:

Lump Sum Money: When a family receives lump sum money such as an inheritance, a Social Security back payment, insurance settlement, gift, etc., the money will be deducted from the AFDC grant, whether or not it has already been spent. If the lump sum added to other family income totals more than the AFDC maximum for that size family, the family will be ineligible for the month in which the lump sum was received (and possibly for a number of following months), whether or not the money is spent before the period of ineligibility has gone by. If the family already received an AFDC grant that month, the grant would be "re-couped" by the welfare agency.

equal to the lump sum divided by the recipient's monthly standard of need. As established in Section II. A. of this opinion, notice of this aspect of the rule is crucial, particularly since it represents a dramatic departure from prior policy. The letter could have explained this feature with little extra effort and without unduly lengthening or complicating its discussion of the rule.¹⁷

A further shortcoming of the letter arises from the fact that while it indicated that the rule would become effective October 1, 1981, the rule was not actually implemented until February 1, 1982. No follow-up letter was sent to report or explain this change. Recipients who got lump sums during the October-February interregnum received the lenient treatment called for under the old rule. At least for these persons, because the letter was ultimately inaccurate in reporting the rule's effectiveness date, it provided inadequate notice.

We therefore hold that 45 C.F.R. §206.10(a)(2)(i) required the defendant to provide AFDC recipients with advance written notice of the lump-sum rule, and that the September 1981 letter did not constitute such notice.

III. QUERN NOTICE

The second issue raised by the defendant on appeal is whether the *Quern* notice relief ordered by the District Court was proper. Levine argues that *Quern* notice is inappropriate here for two reasons: First, he contends that notice to class members that they might apply to the State of Minnesota for

17. We note that another section of the September 1981 letter stated:

Please note: This letter is not intended as a detailed explanation of all the changes; you must get that from your financial worker. There may be some changes which affect you which either are not mentioned at all or are mentioned only in general terms. You will receive a formal, written notice from your county welfare agency if and before any adverse action is taken; your right to appeal will be explained on that notice.

Id. (emphasis in original).

To the extent that this section referred to the letter's discussion of the lump-sum rule, DPW's own view of the letter supports our conclusion that it did not adequately inform recipients of the mechanics of the lump-sum rule.

corrective payments was improper and, citing *Green v. Mansour*, 106 S. Ct. 423 (1985), an Eleventh Amendment violation, because, he argues, class members would in no event actually be able to obtain corrective payments. His position is that 45 C.F.R. §233.20(a)(13)(ii), which governs recovery of overpayments and correction of underpayments, does not permit corrective payments to recipients who failed to meet eligibility requirements but were harmed by inadequate notice. He adds that, at any rate, corrective payments would be an improper remedy for inadequate notice because they would constitute a "windfall" to recipients and would result in the continuation of benefits at a level exceeding that authorized by Congress. Levine's second argument is that the District Court's order exceeds Eleventh Amendment constraints to the extent that the order itself creates a "substantive right" to corrective payments.

We conclude that the first of the defendant's arguments was rendered moot before this appeal was argued. Counsel reported to us at argument that the *Quern* notices were mailed out in November 1985. Therefore, so far as the propriety of sending this notice is concerned, there remains no live controversy between Levine and the plaintiffs on which a federal court could grant relief.

The defendant's second argument is not moot, since its thrust is that the *Quern* notice order not only ordered notice, but also established a right in class members to corrective payments from the State. While this argument remains live, it is not difficult to resolve. The District Court explicitly and repeatedly stated that it was not ordering the defendant to pay retroactive benefits to AFDC members, correctly observing that under *Edelman v. Jordan*, 415 U.S. 651 (1974), this would be barred by the Eleventh Amendment. See 598 F. Supp. at 1055; 605 F. Supp. at 1248-1249; Opinion of June 13, 1985, slip op. at 3; 621 F. Supp. at 515. Instead, the notice approved by the District Court merely informs plaintiff-class members of the federal lawsuit's resolution and of the fact that they may apply for corrective benefits from DPW. See *Quern*, 440 U.S. at 347-348. This notice will not lead inevitably to the payment of retroactive benefits; for example, a notice recipient may decide not to apply to DPW for corrective

benefits, or may be held ineligible by DPW for corrective payments because he or she received actual notice of the lump-sum rule before spending any of it.¹⁸ Here, as in *Quern*, "the chain of causation" between the District Court's notice order and the payment of state funds for retroactive benefits "is by no means unbroken; it contains numerous missing links, which can be supplied, if at all, only by the State and members of the plaintiff class and not by a federal court." *Id.* at 347. We therefore hold that the District Court's *Quern* notice order withstands this Eleventh Amendment challenge. Any actual payments made will be the choice of the State. They are not compelled by the order of the District Court.

IV. ENJOINING DPW RECOUPMENT

The final issue before us is whether Kathryn Jenkins is entitled to an injunction against the defendant's efforts to recoup AFDC payments made to Jenkins during her period of ineligibility under the lump-sum rule. In October 1983, Jenkins's family received and spent a lump sum without having received adequate notice of the lump-sum rule. See *supra* n.11; 598 F. Supp. at 1050; 605 F. Supp. at 1246-1247. In November 1983, Jenkins was notified that because of the lump-sum rule, her October and November benefits would be considered "overpayments," and her family would be ineligible for further AFDC benefits until May 1984. Jenkins filed a timely state administrative appeal of this decision, and her benefits were continued pending the appeal. Because the final administrative decision was issued after Jenkins's ineligibility period expired, her family's AFDC benefits were not interrupted. Instead, the Jenkins family has been charged with an "overpayment" of \$5,464.00 for the ineligibility period. The defendant seeks to recoup this sum by withholding one per cent. of Jenkins's benefits each month until the

18. Indeed, as noted *supra* n.7, the District Court held that named plaintiff Helen Stewart lacked standing to raise the notice issue because she received actual notice of the rule from her caseworker before spending any of her lump sum. See 598 F. Supp. at 1043; 605 F. Supp. at 1245 n.3. DPW may well deny recovery to other class members on a similar basis.

full amount has been recovered. See 45 C.F.R. §233.20(a)(13); Minn. Stat. §256.73, subd. 6.

The District Court, though it found that the defendant's failure to provide adequate notice rendered application of the lump-sum rule to her improper, concluded that it would violate the Eleventh Amendment to enjoin the defendant's efforts to recover the alleged overpayment to Jenkins. The defendant argues that, in addition to this state-sovereign-immunity obstacle, the relief Jenkins desires is also unavailable because federal regulations indicate that inadequate notice does not warrant the remedy of permitting a recipient to keep an overpayment. We conclude that an injunction against recoupment is fully consistent with the Eleventh Amendment and is a proper remedy for the defendant's violation of the federal notice regulation.

Prospective, equitable relief is a long-recognized exception to Eleventh Amendment immunity. See *Ex Parte Young*, 209 U.S. 123 (1908). However, the District Court reasoned that to enjoin the defendant's recoupment efforts would be inconsistent with the Eleventh Amendment as interpreted in *Edelman v. Jordan*, *supra*, because it would reduce "the public fisc of the State of Minnesota . . . in the amount of one percent of plaintiff's monthly benefit." 621 F. Supp. at 514. Yet, as *Edelman* makes clear, a remedy against a state ordered by a federal court does not violate the Eleventh Amendment simply because it will have fiscal consequences for the state treasury. 415 U.S. at 667-668. Instead, the point of *Edelman* is that the key to whether a remedy violates the Eleventh Amendment is whether "[i]t requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation" for the state's past breach of a legal duty. *Id.* at 668. The Eleventh Amendment bars "retroactive award[s] of money relief" that, whether they are labeled equitable relief or damage awards, are "in practical effect indistinguishable . . . from an award of damages against the State." *Id.*

An injunction against the defendant's recoupment efforts would not run afoul of these strictures, because DPW has already paid Jenkins the money at issue, the benefit pay-

ments it characterizes as overpayments. The remedy would not be a retroactive award of damages against the State, since it would not require the State to make compensatory payments to Jenkins. Instead, the defendant would simply be ordered to cease efforts to take back funds that it previously paid Jenkins at its own instance, rather than that of a federal court. In contrast, the Eleventh Amendment would bar ordering the defendant to repay any portion of Jenkins's benefits that it has already recovered; further, had Jenkins not continued to receive benefits during her administrative appeal, the Eleventh Amendment would prohibit ordering the defendant to make corrective payments for months in which Jenkins received no benefits. In both of these examples, ordering the defendant to make payments would constitute ordering the state to pay damages - to make compensatory payments for the State's past legal wrongs. Here, the defendant would not be ordered to make compensation, but to refrain from recovering compensation already made.

Our analysis is not altered by the fact that the mechanism that the defendant has elected to use to effect this recovery is that of withholding a portion of Jenkins's AFDC benefits each month. It is true that the injunction under consideration would force the defendant to make larger payments to Jenkins each month than he would make if allowed to reduce her benefits in order to recoup his prior payments to her. Nonetheless, such payments are not damages; they do not compensate Jenkins for the State's past legal deficiencies. Rather, they are "a necessary consequence of compliance in the future" with the determination that the defendant provided inadequate notice of the lump-sum rule. The defendant cannot make an "end run" around a federal court's ability to order that the State not take money away from Jenkins by accomplishing recovery through paying her less AFDC benefits than she normally would receive.¹⁹

19. *Meiner v. State of Missouri*, 673 F.2d 969 (8th Cir.), cert. denied, 459 U.S. 909 (1982), a case relied upon by the District Court, 621 F. Supp. at 514, provides a further illustration of the distinction drawn here. The plaintiff in *Miener*, a girl who suffered serious learning disabilities and behavioral disorders, claimed, *inter alia*, that she had been deprived by

Having disposed of the Eleventh Amendment objection to enjoining defendant Levine's recoupment efforts, we take up the defendant's assertion that permitting Jenkins to retain benefits paid her during her ineligibility period is barred by federal regulations. The defendant first argues that the payments to Jenkins were "overpayments," as defined in 45 C.F.R. §233.20(a)(13)(i), because Jenkins has accurately been determined ineligible for the benefits under the lump-sum rule. He continues that 45 C.F.R. §233.20(a)(13) directs states to recover overpayments, and does not permit states to forego recovery even where the overpayment is the result of agency error rather than recipient misconduct. Therefore, the defendant concludes, while Jenkins bears no fault in causing her overpayment, the defendant is nonetheless entitled to recover it.

The fundamental flaw in this argument occurs in its first step: the payments to Jenkins cannot be considered an overpayment, because the defendant, having failed to provide adequate notice to Jenkins of the lump-sum rule, cannot properly invoke it against her. By failing to comply with the notice regulation, DPW failed to institute a legal change in its eligibility rules. See *Kimble v. Solomon*, 599 F.2d 599, 604 (4th Cir.), cert. denied, 444 U.S. 950 (1979). Jenkins's case must be governed by the prior policy towards lump sums, and under that policy she was eligible for most or all of the benefits the defendant wishes to recoup.²⁰

the State of an appropriate free education in violation of the Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq.* She sought injunctive relief ordering the State to provide her "compensatory educational services to overcome the effects of any past denial of special educational services," *id.* at 972, as opposed to an injunction ordering that she be provided the educational services to which she would be entitled absent any past State violation. We held that this violated the Eleventh Amendment. *Id.* at 982. On the other hand, if had it been the case in *Miener* that the State had provided her proper educational services in prior years, but had determined to recover the cost of these services by withholding future educational services, to which *Miener* was otherwise entitled, it would not violate the Eleventh Amendment to enjoin the State's withholding efforts.

20. Of course, the defendant could properly recoup any payments for which Jenkins was ineligible under the prior lump-sum rule.

The defendant also asserts that the corrective payments are an improper remedy for inadequate notice because the payments would be a "windfall" to recipients and would continue benefits at a level greater than that desired by Congress, citing *Foggs v. Block*, 722 F.2d 933, 941 (1st Cir. 1983), *rev'd on other grounds sub nom. Atkins v. Parker*, 105 S. Ct. 2520 (1985).

We find *Foggs* distinguishable from the present case. *Foggs* involved a due-process challenge to a state's failure to notify each food-stamp recipient individually of the reduction in that recipient's benefits that would result from a statutory change in benefit-calculation methods. The Court found it an adequate remedy to order the State to review its files to ensure that each recipient's benefits had been accurately recalculated. 722 F.2d at 941. At issue here is not individualized notice of the effect of the new rule upon each recipient, but advance notice of a rule change and the new rule's general operation. Our concern is not that such advance notice was necessary to prevent erroneous application of the lump-sum rule, but that without adequate advance notice recipients could not be expected to budget their lump sum as Congress intended, and would be left without funds to pay for necessities. Permitting retention of ineligibility-period payments by lump-sum recipients who, like Jenkins, spent their lump sums in the belief that the old rule was still in force is hardly granting them a "windfall." Other circuit courts have found it proper where the state has provided inadequate notice of changed standards to recipients to order the restoration of benefits under the previously governing standard, see *Buckhannon v. Percy*, 708 F.2d 1209, 1216 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984), *Kimble v. Solomon*, 599 F.2d 599 (4th Cir. 1979), *cert. denied*, 444 U.S. 950 (1980), and we agree.

We conclude that an injunction barring the defendant from recouping the payments made to Jenkins during her ineligibility period would be consistent with the Eleventh Amendment, and would, moreover, be an appropriate remedy in this case.

V. CONCLUSION

We hold that the defendant failed to provide recipients advance written notice of the lump-sum rule required by the federal notice regulation, that the defendant's challenge to the *Quern* notice order is in part moot, and in all other regards without merit, and that an injunction against the defendant's efforts to recoup payments made to Kathryn Jenkins is consistent with the Eleventh Amendment and a proper remedy. The decision of the District Court is affirmed in part and reversed in part, and the cause is remanded for further proceedings consistent with this opinion.

FAGG, Circuit Judge, dissenting.

By focusing its attention on a general, nonspecific regulation of the Secretary of Health and Human Services (Secretary), 45 C.F.R. §206.10(a)(2)(i), the court today concludes that the Minnesota Department of Public Welfare was legally required to give "appropriate" advance written notice of the 1981 amendment to the lump-sum rule before the agency could implement that amendment. Not only is this result not constitutionally mandated, but more important this result is contrary to the expressed intent of Congress.

Constitutionally, a recipient of AFDC benefits has "no greater right to advance notice of legislative change * * * than [does] any other voter[]." *Atkins v. Parker*, 105 S. Ct. 2520, 2530 (1985) (footnote omitted). Rather, an AFDC beneficiary, like all other citizens, is "presumptively charged with knowledge of the law," *id.*, and has an affirmative obligation to remain informed about changes in legislative policies that may affect his or her continuing entitlement to welfare benefits, *see id.* at 2531. Only when a recipient has no adequate opportunity to become familiar with a congressionally adopted AFDC eligibility requirement might due process be implicated. *Id.* at 2530.

Here, the 1981 amendment to the lump-sum rule became effective in Minnesota on February 1, 1982. Kathryn Jenkins, who had no legal right to assume the lump-sum rule might not be modified, did not apply for AFDC benefits until November of 1982. The lump-sum giving rise to the present controversy was not received by her family until October of

1983. Without question, between February of 1982 and October of 1983, Jenkins had an adequate opportunity to become familiar with the applicable rule. Thus, it may be presumed that she had knowledge of the rule and its potential application to her. *See id.* Due process required no more, and as a result advance written notice was not constitutionally mandated.

Equally as clear, Congress did not require that Minnesota give advance written notice prior to the implementation of the 1981 amendment to the lump-sum rule. Rather, in adopting the amendment Congress expressly states that the amendment "shall become effective on October 1, 1981" or "will become effective * * * the first month * * * after * * * the first [state legislative session] ending on or after October 1, 1981." Omnibus Budget Reconciliation Act of 1981 (Act), Pub. L. No. 97-35, § 2321, 95 Stat. 357, 859-60 (1981) (emphasis added).

The second possible effective date provided for by Congress was applicable to those states that require an opportunity to pass conforming state laws. Minnesota was such a state, and its first legislative session after October 1, 1981, ended in January of 1982. Thus, as applied to Minnesota, Congress provided that the 1981 amendment to the lump-sum rule "will" become effective on February 1, 1982.

Conspicuously absent from the Act was any suggestion that in addition to this explicit effectiveness date Congress intended to include the implicit qualification that the implementation of the amendment hinged decisively on the state providing applicants and recipients alike with "appropriate" advance written notice of the amendment's pending implementation. The court ignores the absence of such a requirement and instead seizes upon a regulation of the Secretary as a basis for requiring such notice. *See* 45 C.F.R. § 206.10(a)(2)(i). This regulation, however, which is of general applicability and was not adopted in direct response to the amendment, does not mandate that implementation of congressionally adopted eligibility requirements be preceded by advance written notice. Instead, the regulation simply requires the state to publicize generally in written form, and orally as appropriate, the AFDC program and its availability. *Id.*

However, even accepting the court's conclusion that the regulation can be read to require advance written notice prior to implementation, such a reading is, in my view, inconsistent with Congress's express statement that the amendment "will become effective" in Minnesota on February 1, 1982. To that extent, the regulation cannot be enforced. Congress could itself have required advance written notice or left the implementation of the amendment entirely to the Secretary. It did not do so but rather specifically determined the date on which the amendment would become fully effective. We have no choice but to respect that decision.

Because I believe that both constitutionally and statutorily Jenkins received all the notice she was entitled to receive, I conclude the state had every right to apply the 1981 amendment to the lump-sum rule to her situation. As a consequence, I also conclude the state has the right to recoup any overpayments that might have been made to her. In my view, the district court's decision should be reversed and the case dismissed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION**

Sharon Slaughter,
Helen Stewart and
Kathryn Jenkins,
Plaintiffs

CIVIL 4-83-579

v.

Leonard Levine,
in his capacity
as Commissioner of
the Minnesota Department
of Public Welfare,
Defendant and
Third Party Plaintiff

**MEMORANDUM AND
ORDER**

v.

Margaret Heckler,
in her capacity as
Secretary, United
States Department of
Health and
Human Services,
Third Party Defendant.

Mary Grau, Legal Aid Society of Minneapolis, Inc., 222 Grain Exchange Building, 323 Fourth Avenue South, Minneapolis, MN 55415, for plaintiffs.

Hubert H. Humphrey, III, Attorney General, State of Minnesota, and Vicki Sleeper, Special Assistant Attorney General, 515 Transportation building, St. Paul, MN 55155, for defendant and third party plaintiff.

James M. Rosenbaum, United States Attorney, and Mary L. Egan, Assistant United States Attorney, 234 U.S. Courthouse, Minneapolis, MN 55401, and Lewis K. Wise, Wendy Kloner, Civil Division, Department of Justice, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530, for third party defendant.

This matter is before the Court on plaintiffs' motion for class certification and on the parties' cross motions for summary judgment.

FACTS

Plaintiffs in this case are recipients of Aid to Families with Dependent Children (AFDC) benefits who live in Minnesota. They seek declaratory and injunctive relief on behalf of themselves and others similarly situated in connection with defendant Minnesota Department of Public Welfare's (DPW) policy regarding the receipt of lump sum income by AFDC recipients. Plaintiffs allege that the lump sum policy violates the Social Security Act, 42 U.S.C. § 601 *et seq.*, federal regulations promulgated under the Act, and the due process and equal protection clauses of the U.S. Constitution. Defendant has brought a third party complaint against Margaret Heckler, Secretary, United States Department of Health and Human Services (HHS). The third party complaint contends that the HHS' regulations on lump sum income are partially invalid, but that defendant is forced to carry them out on penalty of losing federal funding.

Defendant defines "lump sum" income as income which comes from a non-recurring source. DPW Instructional Bulletin 82-3, Attachment 13.¹ Defendant's policy requires that AFDC recipients who receive lump sum income be determined ineligible for benefits for a predetermined number of months. The period of ineligibility is determined by a formula which prorates the lump sum for a period of months according to the family's monthly AFDC grant amount. Defendant's policy regarding lump sum ineligibility is compelled by federal regulation 45 C.F.R. § 233.20(a)(3)(ii)(D). Under this regulation, the formula is applied regardless of whether the lump sum income is actually available for the family's support.

1. Included in defendant's definition of lump sums are gifts, inheritances, contributions, some insurance settlements, back pay, and profit sharing. Excluded from the definition are settlements from the sale of a home-
stead, divorce settlements, retroactive AFDC payments, and insurance settlements to pay medical bills or replace property loss. *Id.*

The second named plaintiff² in this action is Helen Stewart.³ Stewart received AFDC benefits through Goodhue County for several years prior to 1982. In November, 1982 she received a workers' compensation settlement in the amount of \$5,180. Plaintiff contacted her caseworker by phone on November 8, 1982 and reported the receipt of this lump sum. The caseworker advised plaintiff that she and her 11-year-old child would be declared ineligible for AFDC benefits for a number of months as a result of the workers' compensation settlement. Plaintiff's benefits were subsequently terminated, with her consent, on December 1, 1982. Plaintiff's food stamps and medical assistance benefits were also terminated at this time.⁴ She used the lump sum settlement, which was her only source of income, to support herself and her child until July, 1983, at which point the funds had been exhausted. Plaintiff spent the lump sum funds on ordinary living expenses and on medical expenses. When plaintiff reapplied for AFDC benefits in July, 1983, her application was denied on the basis that her lump sum settlement had rendered her ineligible for a full grant until March of 1984. At the time plaintiff reapplied, she faced \$3,400 in hospital bills and almost \$400 in utility bills. Plaintiff's administrative appeals were denied. She was reinstated to AFDC in February, 1984, but received no funds for the period July, 1983 to February, 1984.

The third named plaintiff is Kathryn Jenkins.⁵ In November of 1982 Jenkins applied and was found eligible for AFDC benefits in Hennepin County. Plaintiff's husband, who was disabled as a result of a job-related accident, had workers' compensation and social security disability claims pending at the time of the AFDC application. Plaintiff advised the AFDC

2. Named plaintiff Sharon Slaughter has accepted an offer of settlement and is no longer considered to be a party to this action.
3. The Court allowed Stewart to intervene as a plaintiff in this action pursuant to Fed.R.Civ.P. 24(b), which allows for permissive intervention, on February 2, 1984.
4. Food stamps and medical assistance benefits are supplements to AFDC and are normally terminated by defendant when AFDC benefits are terminated due to receipt of a lump sum.
5. The Court allowed Jenkins to intervene on September 21, 1984, pursuant to Fed.R.Civ.P. 24(b).

caseworker of these pending claims, but was not informed of the lump sum formula used by defendant. Plaintiff's husband received a disability check in the amount of \$5,752 on October 31, 1983. That same day, he wrote a check in the amount of \$3,863.75 to satisfy the arrearage on his home mortgage because his property was about to go into foreclosure. Plaintiff's husband also wrote a check for \$1,366 on that day to satisfy an overdue car repair bill. The remaining \$500-\$600 was spent on other bills and on clothing for plaintiff's children.

When plaintiff reported the receipt of the the disability settlement to Hennepin County welfare authorities two days later, on November 2, 1983, she was advised for the first time of the lump sum rule. On November 3, 1983, Hennepin County advised her that her October and November AFDC grants would be considered an overpayment,⁶ that her benefits would be terminated as of December 1, 1983, and that she would remain ineligible until May, 1984. Plaintiff appealed the decision and her benefits were continued pending the outcome. Defendant rejected plaintiff's appeal on August 9, 1984 and notified plaintiff on September 5, 1984 that she would be charged an overpayment of \$5,464.

DISCUSSION

I. CLASS CERTIFICATION

Plaintiffs define the class they seek to represent as follows:

those individuals in the state of Minnesota who are otherwise eligible for AFDC benefits and who have been, or will be, found ineligible for AFDC benefits for a predetermined number of months as a consequence of receipt of lump sum income by one of the members of an AFDC assistance unit of which they have been a member.

6. Overpayments are AFDC benefits to which the recipient is not entitled. In order to recoup overpayments, defendant reduces the monthly AFDC grant (once reinstituted) until the full amount has been recovered. Federal regulations require the states to take this action. 45 C.F.R. § 233.20(a)(13).

Fed.R.Civ.P. 23(a) sets forth four prerequisites to the maintenance of a class action:

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
- (4) the representative parties will fairly and adequately protect the interests of the class.

The party seeking to represent the class bears the burden of establishing that all four requirements are satisfied. *Smith v. Merchants & Farmers Bank of West Helena, Arkansas*, 574 F.2d 982 (8th Cir. 1978). Prior to the consideration of the criteria set forth under Rule 23(a), the Court must find that a precisely defined class exists, *Roman v. ESB, Inc.*, 550 F.2d 1343, 1348 (4th Cir. 1976) and also that the class representative(s) is a member of the class. *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) ("class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members"). These requirements are implicit prerequisites to the maintenance of an action under Rule 23.

If plaintiffs satisfy the implicit and explicit requirements of Rule 23(a), they then must demonstrate that the action sought to be certified falls within one of the three categories set forth in Rule 23(b). Plaintiffs contend that this action may be properly maintained as a class action because it is the type of case set forth in Rule 23(b)(2):

[T]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]

A. Existence of Precisely Drawn Class

The third party defendant argues that the proposed class is overbroad because it includes persons who have not suffered or may never suffer any injury. These individuals would include families who the third party defendant contends will find it less difficult to rely on their own resources, or who may no longer qualify for or want AFDC as a result of receiving a lump sum. While their numbers would no doubt be few (or perhaps even non-existent), there may be some individuals in the proposed class who will receive a lump sum settlement so large that it enables them to live comfortably. Despite their ineligibility for AFDC benefits, these individuals would not suffer injury from defendant's policy and would therefore lack standing. The definition of a class cannot be so broad that it includes persons without standing to bring the action on their own behalf. Each class member must have standing to bring the suit in his own right. *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 878 (D.S.D. 1982); *Lamb v. Hamblin*, 57 F.R.D. 58, 60-61 (D.Minn. 1972).

The slight overbreadth in the proposed class definition is not fatal. The Court has the authority to redefine a proposed class in such a way as to allow the class action to be maintained. *Lamb*, 57 F.R.D. at 60 (limiting the class to those individuals with standing); *Metropolitan Area Housing Alliance v. U.S. Department of Housing and Urban Development*, 69 F.R.D. 633 (D.Ill. 1976). Accordingly, the Court has redefined the class as follows, in order to exclude those individuals who might lack standing to bring an action on their own behalf:

those individuals in the state of Minnesota who are otherwise eligible for AFDC benefits and who have been, or will be, found ineligible for AFDC benefits for a predetermined number of months as a consequence of receipt of lump sum income by one of the members of an AFDC assistance unit of which they have been a member, and whose lump sum has or will become unavailable to them in whole or in part prior to their re-eligibility for benefits.

(Court's addition to plaintiff's proposed class underlined.)

B. Numerosity

Rule 23(a)(1) mandates that the class be so large that joinder would be impracticable. Neither defendant nor third party defendant opposes class certification on this ground. Indeed, defendant has conceded that joinder would be impracticable. Moreover, plaintiffs have identified at least 70 families who were adversely affected by defendant's lump sum rule during the year prior to their motion for certification. There is no definite standard as to what size class satisfies the requirement of Rule 23(a)(1). 7 C.Wright & A.Miller, *Federal Practice and Procedure*, § 1762. Courts have, however, certified classes containing as few as 25, *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 463 (E.D.Pa. 1968) and 35, *Fidelis Corp. v. Litton Industries, Inc.*, 293 F.Supp. 164 (S.D.N.Y. 1968). The decision as to whether joinder is impracticable is essentially a subjective determination based on expediency and the inconvenience of trying individual suits. *Pabon v. McIntosh*, 546 F.Supp. 1328, 1333 (E.D.Pa. 1982). In the case before the Court, certification of a class would clearly serve important interests of judicial economy. Accordingly, the Court finds that the numerosity requirement of Rule 23(a)(1) has been met.

C. Common questions of law or fact

Rule 23(a)(2) requires that there be questions of law or fact common to the class. This provision does not require a complete identity of legal claims. *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526, 532 (5th Cir. 1978). Moreover, the United States Court of Appeals for the Eighth Circuit has held on several occasions that factual differences are not fatal to the maintenance of a class action, as long as common questions of law exist. *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980); *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 699-700 (8th Cir. 1980). In civil rights actions, the courts generally take a somewhat relaxed view of this requirement. See, e.g., *Lyons v. Weinberger*, 376 F.Supp. 248, 263 (S.D.N.Y. 1974); *Pabon v. McIntosh*, 546 F.Supp. 1328, 1333 (E.D.Pa. 1982).

Plaintiffs argue that there are common questions of law since all of the class members have been denied benefits as a result of defendant's lump sum policy. Defendant and third party defendant have not specifically contended that plaintiffs have failed to satisfy the commonality requirement of Rule 23(a)(2). The third party defendant does argue, however, that class certification should be denied because of the variety of factual situations presented by the proposed class. This is essentially a commonality argument, and it raises the most serious question with regard to class certification.

The only decision that has been called to the Court's attention which has considered the propriety of certifying a class action in a suit posing the issues presently before the Court is *Vermeulen v. Kheder*, Civ. No. K 82-135 (W.D.Mich. Dec. 20, 1983). The court in *Vermeulen* refused to certify a class in a challenge to the lump sum rule, in part because it found that plaintiffs had failed to satisfy the requirements of Rule 23(a)(2). Plaintiffs in *Vermeulen*, as in the instant case, argued that there was a common question of law as to whether the lump sum rule was being legally applied to the members of the proposed class. The court rejected this argument because of the divergent factual settings in which the class members lost their lump sum income:

These factual differences are sufficient to preclude class certification under 23(a)(2). The factual context of the case is obviously significant in determining whether a particular individual is able to establish whether the application of the lump sum rule violates to him the Social Security Act and/or the due process and equal protection clauses. For example, a person who spent his lump sum on alcohol may be less entitled to relief than a person whose spouse absconded with the lump sum.

Id., slip op. at 8-9.

The case before the Court clearly presents a variety of factual situations. A lump sum may become unavailable to a class member because it is stolen, as in the case of the original named plaintiff Sharon Slaughter. It may become unavailable because the class member expends the money on past debts

prior to learning of the lump sum rule and prior to having AFDC benefits terminated, as in the case of intervenor Kathryn Jenkins. Finally, the lump sum may become unavailable to a class member subsequent to termination of AFDC benefits, simply because the lump sum funds are totally expended, as in the case of plaintiff Helen Stewart. In the latter category, the funds may be exhausted as a result of good faith expenditures on basic living necessities, or as a result of simply spending the money too quickly.

Despite the existence of these factual variations, the Court rejects the approach taken by the district court in *Vermeulen*, and finds that plaintiffs have demonstrated sufficient common questions of law in order to meet the requirements of Rule 23(a)(2). A number of courts have held that a diversity of factual circumstances need not defeat class certification where common legal questions exist. See, e.g., *Leist v. Shawano County*, 91 F.R.D. 64, 67 (E.D.Wisc. 1981) (factual differences between class members regarding eligibility or amount of aid under welfare program, but plaintiffs uniformly impacted by absence of written criteria for program); *Like v. Carter*, 448 F.2d 708, 802 (8th Cir. 1971), cert. denied, 405 U.S. 1045 (1972) (class of welfare recipients whose applications were not acted upon timely; common legal questions include interpretation and validity of state and federal statutes and regulations).

The cases that the district court relied on in *Vermeulen* are distinguishable. The legal questions in each of those cases were mixed fact-law questions which a court could not adjudicate without looking at the facts of each case. In *Metcalf v. Edelman*, 64 F.R.D. 407 (N.D.Ill. 1974), which involved a challenge to a public shelter subsidy system, the issue before the court was whether the defendants were providing members of the proposed class with livable shelter; the resolution of such a legal issue would obviously hinge directly on the facts of each individual case. In *Fuzie v. Manor Care, Inc.*, 461 F.Supp. 689 (N.D.Ohio 1977), the other case relied on by the court in *Vermeulen*, the proposed plaintiff class consisted of Medicaid recipients residing at private nursing homes who alleged that their discharges from such homes were based solely on their Medicaid status. Again, a determination

whether a discharge was authorized under the applicable federal regulations would require an examination of the facts of each particular case. In the case before the Court, by contrast, plaintiffs make *generalized* procedural and substantive legal claims which do not turn on the facts of individual cases.

Plaintiffs advance five arguments for striking down the lump sum policy. All but one of these are common to the class. First, plaintiffs argue that the policy violates the Social Security Act because it does not take into account the actual availability of the funds in determining eligibility. This is a strictly legal argument that does not require an inquiry into the facts of each class member. Second, plaintiffs argue that the policy violates the equal protection clause of the fourteenth amendment by irrationally distinguishing between current recipients and non-recipients of AFDC. Again, this is a generalized legal argument, common to all class members, the resolution of which does not require an examination of individual fact situations. The same can be said about plaintiffs' third and fourth arguments—that the policy violates due process by establishing an irrebuttable presumption of unavailability and by punishing innocent AFDC recipients for the wrongdoing of others.

The only legal question which is not common to all class members is the issue of whether defendant's failure to provide adequate notice of the lump sum policy violates federal regulations or the due process clause. Named plaintiff Kathryn Jenkins' complaint squarely raises the notice issue; named plaintiff Helen Stewart does not have standing to raise the notice issue, since she exhausted her lump sum funds *after* she was informed of the policy. There are presumably other members of the class who were and are similarly unaffected by the lack of notice.

The fact that plaintiffs' notice claim may not be common to all members of the proposed class is an insufficient reason for denying class certification for failure to meet the requirements of Rule 23(a)(2). While there is no quantitative or qualitative test of commonality that must be met in order to satisfy Rule 23(a)(2); 7 C.Wright & A.Miller, *Federal Practice & Procedure*, § 1763 at 603, there is considerable authority

that there need not be complete identity of legal claims. *E.g.*, *Johnson v. American Credit Co. of Georgia*. In *Tonya K. v. Chicago Board of Education*, 551 F.Supp. 1107, 1111 (N.D. Ill. 1982), the district court stated that Rule 23(a)(2) was satisfied as long as there is a single issue in common to all class members. The use of the plural "questions" in the language of the rule itself suggests a slightly stricter standard—that more than one issue of law be common to the class members. 7 C.Wright & A.Miller, *Federal Practice & Procedure*, § 1763 at 604. Whichever standard is used, there are a substantial number of legal questions which are common to the entire class in this case, so as to warrant class certification. Moreover, while there may be some individuals in the class who did not or will not suffer as a result of the allegedly inadequate notice, it is apparent that the lack of notice is an endemic, system-wide problem which likely affects a substantial portion of the class. Finally, the policies of judicial economy and litigant convenience which underly the class action mechanism militate in favor of a finding that the commonality requirement has been met. See *Taliaferro v. State Council of Higher Education*, 372 F.Supp. 1378, 1387 (E.D.Va. 1974).

D. Typicality

Rule 23(a)(3) requires that the claims of the representative parties be typical of the class claims. Plaintiffs correctly cite *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830-31 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977) for the Eighth Circuit's fairly relaxed interpretation of this requirement:

[T]he typicality provision requires a demonstration that there are other members of the class who have the same or similar grievances as the plaintiff

. . . .

. . . . When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment.

It is fairly clear that named plaintiffs Helen Stewart and Kathryn Jenkins have grievances that are similar to other

class members.⁷ As plaintiffs point out, the other class members received lump sum income and were denied eligibility as a result. The fact that the named representatives' claims are typical is further evidenced by an affidavit submitted by one of defendant's employees, which asserts that 41 out of 42 administrative appeals of lump sum terminations concerned recipients who had spent the lump sum for various reasons.⁸

E. Adequacy of representation

The adequacy requirement of Rule 23(a)(4) actually embodies two requirements. First, the representative must not possess interests which are antagonistic to the interests of the class. Second, the plaintiffs must be represented by counsel of sufficient diligence and competence to fully litigate the claim. *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir.), cert. denied, 429 U.S. 870 (1976). Neither defendant nor third party defendant challenges the second aspect of this requirement; the qualifications of the Legal Aid Society of Minneapolis are adequate with respect to this type of litigation. Defendant does, however, strenuously argue that the named plaintiffs cannot fairly and adequately protect the interests of the class.

Defendant's argument is based on a June, 1984 amendment to the lump sum provision of the Social Security Act at issue in this case, 42 U.S.C. § 602(a)(17); CONG.REC., June 22, 1984 at 6554. This amendment gives states the option of recalculating an AFDC recipient's period of ineligibility resulting from lump sum income in three situations, commencing October 1, 1984:

1. where the recipient's benefit level would have increased during the period;

7. Defendant's sole argument on the typicality requirement is that the original named plaintiff Slaughter's claims are not typical of the class, since there are very few cases in which the lump sum becomes unavailable for reasons truly beyond the control of the recipient (Slaughter's lump sum was stolen). Since Slaughter has settled her claim, this argument is no longer valid.

8. Affidavit of Marcia Schmidt, policy analyst, Minnesota Department of Human Services, September 7, 1984.

2. where the lump sum income has become unavailable to the recipients for reasons beyond their control;
3. where the family expends the lump sum funds on medical expenses.

Id. While this amendment does not mandate that the states consider the availability of the lump sum in the above three situations, defendant contends that the history of the instant litigation (in particular, defendant's third party complaint against the HHS alleging that the lump sum regulation is inconsistent with the Social Security Act) demonstrates its intent to exercise the option.

Defendant, relying on *Kremans v. Bartley*, 431 U.S. 119 (1977), argues that the recent amendment to the Social Security Act fragments the proposed class and renders the named plaintiffs inadequate representatives of the class. A major portion of this argument is that the interests of the original named plaintiff, whose lump sum was stolen, are incompatible with the interests of plaintiff Stewart, who spent her lump sum, since the recent statutory amendments strengthen the former's case and weaken the latter's. Since the original plaintiff has settled, this argument is no longer valid. Moreover, there are no incompatible interests between plaintiff Stewart and plaintiff Jenkins; both had their lump sum become unavailable to them because they spent it prior to the end of their ineligibility period. The recent statutory amendment to the lump sum rule is an insufficient reason to deny class certification in this case. First, the exceptions to the rule become applicable only if defendant chooses to implement them, and it has yet to officially exercise this option. Second, and more importantly, even if defendant does exercise the statutory option allowing for limited consideration of the lump sum's availability, the amendment has no effect on plaintiffs' equal protection claims or regulatory and due process lack of notice claims.

F. Rule 23(b)(2)

Rule 23(b)(2) provides that the defendant must have "acted or refused to act on grounds generally applicable to the class," so that it is appropriate to grant final injunctive relief

with respect to the class as a whole. Plaintiffs have met this requirement. They correctly cite *Coley v. Clinton*, 635 F.2d 1364, 1379 (8th Cir. 1980) for the proposition that the requirements of Rule 23(b)(2) are to be construed liberally in the context of civil rights suits. *Coley* held that a district court's discretion to deny class certification on the basis of this provision is limited. *Id.* at 1378. Since the plaintiffs have met the requirement of Rule 23(a), and since defendant has a uniform policy with respect to the class that is susceptible of injunctive relief, plaintiffs should be certified as a class under Rule 23(b)(2).

II. Summary Judgment

A. No material issues of fact

Fed.R.Civ.P. 56(c) provides that summary judgment may be granted in favor of the moving party if there are no genuine issues as to material fact and if the movant demonstrates that it is entitled to judgment as a matter of law. The facts in the case before the Court are not disputed by any of the parties, so that consideration of the legal questions on summary judgment is appropriate.

B. Statutory issues

The AFDC program, Title IV-A of the Social Security Act, provides cash assistance to needy children who have been deprived of the care and support of one of their parents through either death, continued absence, incapacity or unemployment. 42 U.S.C. § 606(a). In order to establish eligibility for benefits applicants must meet income and asset limitations which are prescribed by law.

AFDC is a program of "cooperative federalism" funded partly by the states and partly by the federal government. State programs must comply with federal law in order to receive federal funds. 42 U.S.C. §§ 601, 602(a). States may not impose eligibility requirements which exclude from coverage persons who are eligible under federal statutes. *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282, 286 (1971); *King v. Smith*, 392 U.S. 309 (1968).

The lump sum policy at issue in this case stems from the Omnibus Budget Reconciliation Act of 1981, which amended the Social Security Act in several important respects. Prior to the 1981 Act, when an AFDC beneficiary received a lump sum he or she was deemed ineligible for the month of receipt, but could reapply for benefits as soon as the sum was exhausted. The 1981 amendment was passed because Congress felt that this practice created a disincentive to use lump sum income for ordinary living expenses. The amendment to the Social Security Act required states to compel AFDC recipients to budget their lump sum income:

A state plan for aid and services to needy families with children must . . .

provide that if a person specified in paragraph (8)(A)(i) or (ii) receives in any month an amount of income which, together with all other income for that month not excluded under paragraph (8), exceeds the State's standard of need applicable to the family of which he is a member —

(A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (8), divided by (ii) the standard of need applicable to such family, and

(B) any income remaining (which amount is less than the applicable monthly standard) shall be treated as income received in the first month following the period of ineligibility specified in subparagraph (A)[.]

42 U.S.C. § 602(a)(17) (emphasis added). This statutory provision did not explicitly require the consideration of the availability of the lump sum, nor did it provide for any explicit exceptions to the lump sum formula. The implementing regulations promulgated by HHS, however, provided for a narrow exception to the lump sum formula in "life threatening circumstances."

A State may shorten the period of ineligibility where it finds that a life-threatening circumstance exists, and the non-recurring income causing the period of ineligibility has been or will be expended in connection with the life-threatening circumstance. Further, until that time the non-recurring income must have been used to meet essential needs and currently the assistance unit must have no other income or resources sufficient to meet the life-threatening circumstance.

45 C.F.R. § 233.20(a)(3)(ii)(D) (emphasis added).⁹

Defendant Levine responded to the 1981 amendment to the Social Security Act by adopting the lump sum policy at issue in this litigation. Department of Public Welfare Instructional Bulletin #82-3 Attachment 13. This policy provides that lump sum income is considered available to the AFDC recipient's family regardless of whether the lump sum is *actually* available.

Section 602(a)(17) was recently amended again, this time to give states the option of recalculating the period of ineligibility caused by receipt of a lump sum in the following three situations:

- (i) an event occurs which, had the family been receiving aid under the State plan for the month of the occurrence, would result in a change in the amount of aid payable for such month under the plan, or (ii) the income received has become unavailable to the members of the family for reasons that were beyond the control of such members, or (iii) the family incurs, becomes responsible for, and pays medical expenses (as allowed by the State) in a month of ineligibility determined under subparagraph (A) (which

9. In a published commentary accompanying the regulation, the Secretary of HHS stated:

After a State makes a determination of future ineligibility based on this provision, future changes in family composition or other relevant circumstances do not change or alter the period of ineligibility. There is also no waiver or good cause provision which can be applied to reduce the period of ineligibility.

46 Fed.Reg. 46755 (September 21, 1981); 47 Fed.Reg. 5656 (February 5, 1982).

expenses may be considered as an offset against the amount of income received in the first month of such ineligibility)[.]

CONG. REC., June 22, 1984 at 6554. Defendant has stated that it intends to exercise the option under this provision, but has yet to formally issue a new policy. The new provision went into effect on October 1, 1984. *Id.*

Plaintiffs argue that the defendant's lump sum policy violates the Social Security Act because it does not take into account the actual availability of lump sum funds in determining AFDC eligibility.¹⁰ The Act provides that state agencies,

shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid[.]

- 42 U.S.C. § 602(a)(7). Plaintiffs correctly cite a number of cases that have interpreted this statutory provision to require that states consider only income and resources that are *actually available* to the recipient. *Engelman v. Amos*, 404 U.S. 23 (1971); *Lewis v. Martin*, 397 U.S. 552 (1979); *Jamroz v. Blum*, 509 F.Supp. 953 (N.D.N.Y. 1981). HHS has promulgated adopted regulations which plaintiffs argue incorporate the principle of actual availability:

Net income . . . and resources available for current use shall be considered; income and resources are considered available both when actually available and when the

10. In their complaint, plaintiffs allege that the lump sum rule violates the Social Security Act because it is applied to recipients who have no earned income in the month of receipt of the lump sum. The Eighth Circuit has recently held, in *Faught v. Heckler*, 736 F.2d 1235 (8th Cir. 1984), that application of the lump sum rule is not limited to AFDC recipients who have earned income in the month of receipt. In light of this decision, plaintiffs dropped this statutory claim.

applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

45 C.F.R. § 233.20(a)(3)(ii)(D). In *Shea v. Vialpando*, 416 U.S. 251, 261-62 (1974), the Supreme Court noted that the purpose of section 602(a)(7) and the above regulation is to ensure "that the amount of assistance actually paid is based on the amount needed in the *individual* case . . . [and upon an] assessment of the particular individual's available income and resources."

Plaintiffs argue that while the lump sum statute, 42 U.S.C. § 602(a)(17), does not explicitly address the question of the availability of lump sum income, it must be read together with section 602(a)(7), which does require a consideration of actual availability. Plaintiffs rely on *Vermeulen v. Kheder*, No. K 82-135 (W.D.Mich. June 3, 1982), in which the United States District Court for the Western District of Michigan relied primarily on the actual availability requirement in granting a preliminary injunction against Michigan's lump sum policy. The court in *Vermeulen* held that the "life threatening" exception in the HHS' regulation is much too narrow to satisfy the actual availability requirement, since lump sum funds can become unavailable for reasons other than those described in the regulation. It observed that "the removal of a lump sum *itself* can create . . . a life threatening circumstance to the children of the family." *Id.* slip op. at 16.

The Court must reject plaintiffs' statutory arguments. The question of congressional intent as to the consideration of actual availability is clearly settled, at least with respect to cases arising after October 1, 1984, the date of the recent amendment to the lump sum provision of the Act. The amendment to section 602(a)(17) does not mandate that the actual availability of lump sum funds be taken into consideration—it gives states the *option* of doing so in three particular situations. Given this expression of legislative intent, there is clearly no requirement that state welfare agencies take actual availability into account with respect to lump sums. Moreover, the amendment makes it clear that if states choose to take availability into account, they may do so only in the three circumstances outlined by the statute.

Plaintiffs make a separate argument that class members in plaintiff Helen Stewart's situation, who cannot make their lump sum last for the entire period of ineligibility, despite a good faith effort, fall into the second category of the new provision, section 602(a)(17) (providing for recalculation in cases where the lump sum has become unavailable for reasons beyond the control of the recipient). While there is an intuitive appeal to this argument, since the loss of food stamps and medical benefits which accompanies AFDC termination makes it extraordinarily difficult to budget the lump sum over the entire period of ineligibility, plaintiffs' argument is incorrect as a matter of statutory interpretation.

This is evident when one examines the structure of the new amendment to section 602(a)(17). One of the circumstances in which the period of ineligibility may now be recalculated is where the recipient spends the lump sum on medical expenses. Since Congress drafted this specific category of expenditures which might exhaust a lump sum, it is not likely that it intended for other expenditures which might exhaust a lump sum to fall within the provision for "reasons beyond the control of the recipient." This provision was rather likely aimed to cover situations where a recipient loses the lump sum or is robbed or otherwise deprived of the money. A second reason for rejecting plaintiffs' statutory argument is that the HHS' implementing regulations leave it up to the state to define "unavailable for reasons beyond the control of the recipient." 45 C.F.R. § 233.20(a)(3)(ii)(F) (effective October 1, 1984).¹¹ The plaintiffs' statutory arguments with respect to those members of the class affected by the lump sum policy after October 1, 1984, then, must fail.

A separate question of statutory interpretation exists with respect to those members of the class who have been affected by the lump sum policy prior to the most recent legislation. The lump sum provision enacted in 1981 contained no express provision regarding the availability of funds. The most plausible interpretation of this silence is that Congress did not

11. Recalculation of the period of ineligibility due to the unavailability of a lump sum for reasons beyond the control of the recipient is possible, of course, only if the state chooses to exercise this statutory option.

intend for availability to be considered.¹² The lump sum statute was enacted by Congress in order to correct what it perceived to be a disincentive for AFDC recipients to use the lump sum income they received to support themselves. *Faught v. Heckler*, 736 F.2d 1235, 1236 (8th Cir. 1984). The committee report accompanying the legislation recommended that:

lump sum payments should be considered available to meet the ongoing needs of an AFDC family. The present treatment of such payments has the perverse effect of encouraging the family to spend such income as quickly as possible in order to retain AFDC eligibility.

Report of the Committee on the Budget, S.Rep.No. 139, 97 Cong. 1st Sess. 505 (1981), *reprinted in* 1981 U.S.Code Cong. & Admin. News 771. The lump sum statute, an admittedly harsh measure, was intended to force AFDC recipients to budget their lump sum according to the monthly grant amount which they would have been receiving. Plaintiffs' position, that the lump sum should be considered "unavailable" to a recipient who spends the money on essential purchases before the period of ineligibility runs out, is contrary to this clearly expressed congressional intent. While the wisdom or the justice of the policy behind the lump sum statute is questionable, it appears beyond question that Congress decided in 1981 that lump sum funds should be

12. Plaintiffs make a strong argument (which defendant joins) that Congress did *not* intend for the lump sum formula contained in 42 U.S.C. § 602(a)(17) to apply to individuals whose lump sum becomes unavailable to them through no fault of their own. The original named plaintiff in this action, whose lump sum was stolen, and the plaintiff in *Vermeulen v. Kheder*, whose husband absconded with the lump sum, are examples of such individuals. The Court does not reach the question of whether the lump sum statute as enacted in 1981 was intended to apply to persons who actually lost physical control over their lump sum. The original named plaintiff who raised this issue has settled, and none of the remaining class representatives have standing to raise this claim. Moreover, plaintiffs have not been able to identify any class members who fall into this category, and defendant's research has suggested that in virtually all cases the lump sum becomes unavailable because the individual spends the money.

considered available regardless of whether they have been expended before the ineligibility period has expired. See *Jackson v. Guissinger*, 589 F.Supp. 1288, 1298 (W.D.La. 1984) (lump sum funds used to pay off previously incurred debt held "available for current use").

The 1984 amendment to the lump sum statute is further evidence that Congress did not intend to incorporate a broad availability requirement when it passed the 1981 act. This amendment clearly represents an attempt to ameliorate some of the harshness of the 1981 act by providing for specific, limited instances when non-availability may be considered. This history of the provision militates against an interpretation that the 1981 act was intended to include a broad requirement of availability. Given the fact that the recent amendment allows for a limited credit against the strict lump sum budget for medical expenditures, it is extremely unlikely that Congress intended for the 1981 statute to contain a broader exception for good faith expenditures. This conclusion is strengthened by the fact that the ameliorative 1984 amendment simply gives states the *option* of taking non-availability into account, therefore making it highly doubtful that Congress intended to *mandate* consideration of non-availability in the 1981. Accordingly, the Court rejects plaintiffs' argument that defendant's lump sum policy violates the Social Security Act with respect to class members whose benefits were terminated both before *and* after the 1984 amendment.

C. Notice Issues

Plaintiffs argue that the defendant's failure to provide Minnesota AFDC recipients with adequate advance notice of the lump sum rule violates federal regulations, 45 C.F.R. § 206.10(a)(2)(i), and the due process clause of the fifth and fourteenth amendments. Because the Court has concluded that the lack of notice to AFDC recipients constitutes a violation of the federal regulation, it will not reach the constitutional issue raised by plaintiffs.

The federal regulation which requires notice provides:

Applicants shall be informed about the eligibility requirements and their rights and obligations under the

program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program, and related services available, and the rights and responsibilities of applicants for and recipients of assistance. Specifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity.

45 C.F.R. § 206.10(a)(2)(i).

Plaintiffs contend that no material of the type envisioned by the regulations exists regarding the lump sum rule. Defendant does not advise AFDC applicants of the lump sum rule at the time they apply for benefits. The only information provided by defendant to Minnesota AFDC recipients regarding the lump sum policy has been a letter dated September 18, 1981. This letter merely told recipients that receipt of a lump sum may "possibly" affect their eligibility, without detailing the lump sum formula or its inflexible application, and thus fell short of the requirement that applicants are to be advised of "condition of eligibility." 45 C.F.R. § 206.10(a)(2)(i). Furthermore, given the considerable turnover on the welfare rolls, the notice was inadequate because it was sent out only once. No class member who applied for AFDC after September 18, 1981 has received any written notice of the lump sum policy. Plaintiffs have offered evidence, which defendant has not contradicted, that recipients are sometimes not advised of the lump sum rule until the defendant sends them a termination of benefits notice; this notice may come as late as a month after the receipt of the lump sum.

There is no question that the lack of advance notice of defendant's policy results in a grossly unfair application of the lump sum rule. The lack of advance notice makes it essentially impossible for the majority of AFDC recipients to budget their lump sums according to the rigid formula imposed by defendant. Recipients are told that they must make their lump sum last until a certain date, but by the time they are so advised, all or part of their funds are gone. The fact that the lump sum funds are spent prior to receipt of notice of the

policy is not surprising, given the fact that AFDC recipients are living at a subsistence level. Plaintiff Jenkins' case is illustrative in this regard. While Jenkins was given notice of the lump sum rule two days after she received the funds, at the time she reported receipt of the money, she had already spent almost the entire amount on children's clothing, unpaid bills, and her home mortgage which was about to go into foreclosure. The inequity of applying the lump sum budgeting formula to an individual in this situation is glaring.

The few cases which have discussed the scope of the federal notice regulation are not particularly helpful in delineating the defendant's responsibilities. See *Simpson v. Miller*, 535 F.Supp. 1041, 1049 n.11 (N.D.Ill. 1982) (dicta) (regulation requires states to inform recipients of child care cost reimbursements and of condition that child care provider be licensed); *Woodruff v. Lavine*, 399 F.Supp. 1008 (S.D.N.Y. 1975) (states under general obligation to inform Medicaid applicants about rights under program); *15,844 Welfare Recipients v. King*, 474 F.Supp. 1374 (D.Mass. 1979). If the federal notice regulation is to serve any meaningful function at all, however, surely it must require effective written notice of a policy which can have such drastic consequences on the recipient. The lump sum rule is clearly a critical "condition of eligibility" in the AFDC program of which recipients should be made aware. Advance notice of the lump sum rule is especially important because the former rule allowed AFDC recipients to reestablish their eligibility for benefits once their lump sum was exhausted. Prior to the adoption of the current rule, the defendant would have advised a recipient of a lump sum to reapply for benefits as soon as the funds were unavailable. A recipient familiar with this policy, absent any notice of the change in the rule, would naturally assume that it was still in effect, and would be totally unable to anticipate the strict budgeting requirements of the new rule.

The defendant's principal objection to plaintiffs' notice claim is that it would be burdensome to give individualized advance notice of an already published regulation which affects a minority of AFDC recipients. Defendant questions where plaintiffs' notice claim would end, given the fact that there are a number of small groups that are affected by

particular regulations. The Court is not persuaded by these arguments. First, the fact that the lump sum policy is contained in a published regulation is of no consequence. AFDC recipients cannot be expected to be fully familiar with the Code of Federal Regulations, as the notice regulation itself implicitly recognizes. Second, while the lump sum rule may not affect a majority of AFDC recipients, it has drastic consequences for those who are affected.¹³

Defendant also makes two other arguments, neither of which are convincing. First, defendant argues that plaintiffs receive notice of termination and a hearing prior to the termination of their benefits pursuant to 45 C.F.R. § 205.10(a)(3). This pretermination hearing, however, is strictly a formality for plaintiffs, since receipt of the lump sum is not generally disputed and since defendant's lump sum policy contains no exceptions. Plaintiffs' argument is essentially that it is unfair to impose the harsh budgeting requirements of the lump sum policy on individuals who are not aware of this policy; the existence of a pretermination hearing is no answer to this argument.

Defendant's second argument is that the federal notice regulation simply requires that it provide information about the lump sum policy at the time plaintiffs report the receipt of a lump sum. The first problem with this argument is that defendant does not always inform plaintiffs of their budgeting responsibilities immediately upon plaintiffs' report of receiving

13. In a statement made during a notice and comment period on section 206.10(a) in 1978, the Secretary of Health, Education, and Welfare rejected an administrative inconvenience argument similar to the one made by defendant in this case. 43 Fed.Reg. 6950 (February 17, 1978). The Secretary made the following observations in response to a state welfare agency's complaint that changing conditions of eligibility necessitated expensive revisions of information bulletins:

Although eligibility conditions change as a result of change in law, it is expected that even as instructional material is made available to agency staff regarding program eligibility changes, an informational flyer could also be prepared for public dissemination.

Id. This commentary suggests that the notice regulation was intended to provide for complete dissemination of eligibility information to AFDC recipients, notwithstanding administrative convenience.

ing the lump sum. Plaintiffs have submitted evidence that in at least some cases, defendant does not advise recipients of the lump sum policy until it sends out the written termination notice; this can be as much as a month after the lump sum is initially reported.¹⁴ The Court believes that *any* delay in advising recipients of the lump sum policy is unfair. The budget which the lump sum policy imposes is extraordinarily difficult, if not impossible, to adhere to. Moreover, since plaintiffs are living at a subsistence level, there is an enormous pressure on them to spend the lump sum as soon as they receive it. In view of these realities, all AFDC recipients should be given advance notice of the details of the lump sum policy. Accordingly, the Court finds that the lack of adequate advance notice of the lump sum policy constitutes a violation of federal regulations. 45 C.F.R. § 206.10(a)(2)(i). In order to correct this violation, defendant must provide AFDC recipients and applicants with adequate information regarding the details of the lump sum policy, as set forth in the remedial portion of this opinion. Further, defendant must give those members of the class whose benefits were terminated in violation of the regulation an opportunity to apply for corrective payments, as set forth in the remedial portion of this opinion.

D. Constitutional Issues

(1) Plaintiffs' irrebuttable presumption argument

Plaintiffs' principal constitutional argument is that the defendant's policy violates the due process because it presumes the lump sum funds to be available for the entire period of ineligibility, regardless of changes in the family's circumstances that make it impossible to rely on the lump sum funds for support. Plaintiffs argue that the inflexible presumption of

14. See Affidavit of Joyce Olson, September 16, 1983. Olson received a lump sum of \$1,120.90 on June 6, 1983, and promptly reported it to her AFDC caseworker two days later. Olson was not given notice of the effect that receipt of this sum would have on her benefits until July 8, 1983. At the time she received this notice, none of the \$1,120.90 remained. Olson had spent the funds on accumulated bills and personal items for her child.

continuing availability built into the policy is not rationally related to any legitimate governmental objective. Plaintiffs concede that the purpose of the lump sum policy—to encourage AFDC recipients to use lump sum funds for ordinary living expenses and to discourage them from spending the funds as quickly as possible in order to regain eligibility for AFDC benefits—is a legitimate governmental objective. The focus of their due process argument is rather on the rationality of the relationship between the lump sum rule and that objective.

Plaintiffs' argument that the lump sum policy is irrational rests primarily on the amount of money that lump sum recipients are expected to live on each month. First, plaintiffs point out that when a recipient's AFDC benefits are terminated due to the receipt of a lump sum, his or her monthly food stamp benefits and medical assistance benefits are typically terminated as well.¹⁵ These supplemental benefits are terminated because the amount of the lump sum often exceeds the maximum resource limits for these programs; separate eligibility criteria exist for the food stamp program, and medical assistance coverage is automatically provided to AFDC recipients. Minn. State. § 256B.06(3). Second, increases in the state's standard of need for AFDC recipients during the period of lump sum ineligibility, which reflect increases in the cost of living, do not operate to reduce that period of ineligibility.¹⁶ Plaintiffs correctly point out that because of the manner in which defendant's policy operates, they are expected to live on

15. While there is not evidence in the record regarding the average value of food stamps and medical assistance payments to families receiving AFDC grants, these programs clearly provide a significant amount of financial support. Plaintiff Stewart's food stamp benefits averaged approximately \$80 per month at the time her AFDC benefits were terminated in December of 1982. At oral argument, counsel for plaintiffs stated that the average value of medical assistance benefits per month is \$62.25.

16. The most recent amendment to the Social Security Act gives states the option of recalculating the period of ineligibility based on such changes in the level of benefits. 42 U.S.C. § 602(a)(17); CONG. REC. June 22, 1984 at 6554.

less money per month than they would have had to if they had not received the lump sum.

Plaintiffs rely on the Supreme Court's decision in *U.S. Department of Agriculture v. Murry*, 413 U.S. 508 (1973). In *Murry*, plaintiffs challenged a provision of the Food Stamp Act which provided that households containing individuals 18 years old or over who had been declared dependent for tax purposes within the previous years, by taxpayers who were themselves ineligible for food stamps, could not participate in the food stamp program. This provision reflected legislative concern about abuses of the food stamp program by college students. The Supreme Court found that the irrebuttable presumption that the tax dependent's household was not needy for food stamp purposes constituted a violation of due process because it lacked a rational basis. *Id.* at 514. Tax deductions taken in previous years with respect to one individual, according to the Court, were not a rational measure of whether the household with which that individual was currently living needed food stamps.¹⁷ Plaintiffs argue that the presumption of continued availability built into defendant's lump sum policy is similarly irrational, for the reasons given above, and that it should therefore be held to violate due process.

The proper standard of review in cases involving constitutional challenges to social welfare programs is minimal scrutiny. The United States Supreme Court, in *Fleming v. Nestor*, 363 U.S. 603 (1960), provided the following description of this standard:

Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if

17. The Court in *Murry* cited two other cases in which it has found that an inflexible legislative classification constitutes an unconstitutional "irrebuttable presumption." *Vandis v. Kline*, 412 U.S. 441 (1973) (statute establishing permanent, conclusive presumption of non-residency for purposes of qualifying for reduced tuition at state university); *Stanley v. Illinois*, 405 U.S. 645 (1972) (presumption that unwed fathers unfit to raise their children).

the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

Id. at 611. The Supreme Court has consistently upheld social welfare legislation under the rational basis test. *See, e.g., Schweiker v. Hogan*, 457 U.S. 569 (1982) (provision of Medicaid benefits based upon income level rationally related to providing scarce resources to the most needy); *Jefferson v. Hackney*, 406 U.S. 535 (1972) (state's reduced standard of need formula, which affected AFDC recipients more adversely than other welfare recipients, rationally related to budget constraints); *Dandridge v. Williams*, 397 U.S. 471 (1970) (state imposition of AFDC grant ceiling, regardless of family size, rationally related to goal of encouraging employment). The Court is convinced that the defendant and third party defendant in the instant case have satisfied the rational basis test, and that the lump sum policy therefore does not offend the due process clause.

The lump sum rule is rationally related to the legitimate governmental objective of encouraging recipients of lump sums to budget their funds. The defendant's lump sum formula clearly removes the disincentive to budget which existed under previous practice, and therefore contributes to the congressional goal of decreasing AFDC expenditures. The Court recognizes that it may be unfair to use the same lump sum to cut AFDC, food stamps, and medical assistance benefits. The fact that the budgeting requirements are stringent, however, does not make the policy irrational. AFDC, food stamps, and medical assistance each have their own separate eligibility standards, which are set by the states. While it might be a wiser and more humane policy to tie the eligibility criteria for the programs together in such a way that a lump sum recipient could continue to receive food stamps and medical assistance, the fact that a law represents a poor policy judgment does not render it unconstitutional. *See Weinberger v. Salfi*, 422 U.S. 749, 777 (1975).¹⁸

18. The Court notes that DPW must, after termination of a recipient's automatic eligibility for medical assistance benefits, reconsider eligibility to determine whether the recipient can qualify for medical assistance

The instant case is distinguishable from the cases in which the Supreme Court has invalidated an "irrebuttable presumption" on the grounds that it is irrational. *U.S. Department of Agriculture v. Murry*; *Vandis v. Kline*; *Stanley v. Illinois*. In these cases, the Supreme Court engaged in a hybrid due process/equal protection analysis. In determining that an irrebuttable presumption was unconstitutionally irrational, the Court looked to whether the classification established by the legislature conclusively presumed facts to be true which might turn out otherwise upon an examination of each individual case. Justice Stewart, in his concurrence in *U.S. Department of Agriculture*, noted that the necessity for an individual hearing was an important element in determining whether a legislative classification amounts to an invalid irrebuttable presumption. 413 U.S. at 515-17. In the case before the Court, plaintiffs are arguing that the lump sum policy is irrational because the budget which it requires recipients to live on is too harsh. There is no rigid classification in this case which rests on a presumption which could be proven untrue in certain cases if a hearing was available. Rather, plaintiffs are taking issue with a basic legislative policy judgment regarding the amount of money which lump sum recipients are expected to live on. As the Court has already indicated, it believes that this policy has a rational basis, and that it is therefore not violative of due process.

(2) Plaintiff's due process "punishment" argument

Plaintiffs argue that the lump sum policy violates due process by punishing AFDC recipients for the actions of third parties over whom they have no control. Plaintiffs contend that it is unconstitutional to deprive children, the intended

independently of the AFDC program. Further, if DPW decides to terminate medical assistance, it must provide adequate and timely notice and an opportunity for a hearing prior to termination. Adequate notice would include notice of the right to receive aid pending review of the decision to terminate medical assistance. *See Jackson v. Guissinger*, 589 F.Supp. 1288, 1301 (W.D.La. 1984); *Stenson v. Blum*, 476 F.Supp. 1331 (S.D.N.Y. 1979), *aff'd without opinion*, 628 F.2d 1345 (2d Cir.), *cert. denied*, 449 U.S. 885 (1980).

beneficiaries of the AFDC program, of benefits because their parents have dissipated the lump sum. The flaw in this argument is the characterization of the deprivation of AFDC benefits as a "punishment." Defendant correctly distinguishes two of the cases cited by plaintiff on the ground that they clearly involved sanctions for wrongdoing. *Cross v. United States*, 512 F.2d 1212 (4th Cir. 1975) (suspension of grocer from food stamp program for alleged violations of the Food Stamp Act); *Wright v. Arkansas Activities Association*, 501 F.2d 25 (8th Cir. 1974) (termination of coach's employment contract for violating rule against conducting pre-season practice). There is no intent to punish wrongdoing in the case before the Court. While the lump sum policy admittedly has a harsh impact on AFDC recipients, the Court cannot accept plaintiffs' characterization of its operation as a "punishment" which offends due process.

(3) Equal protection

Plaintiffs argue that defendant's lump sum policy violates the equal protection clause of the fifth and fourteenth amendments to the Constitution because it irrationally distinguishes between recipients of AFDC and non-recipients of AFDC. The latter group would include those persons who receive a lump sum and then subsequently apply for AFDC benefits, or who receive a lump sum during the application process. Defendant's policy does not prohibit non-recipients who receive a lump sum from spending the entire sum and then applying for AFDC benefits.

The appropriate standard of review in equal protection challenges to social welfare legislation is the rational basis test. *E.g., Dandridge v. Williams*, 397 U.S. 471 (1970). The inquiry under this test is whether the challenged classification bears a rational relationship to a legitimate governmental objective. The Court finds that the distinction which defendant's policy draws between recipients and non-recipients is rational and that the policy therefore does not offend the equal protection clause. Non-recipients are not subject to state welfare agency program rules, so that it is quite rational not to apply the policy to them. Moreover, as the federal third party defendant points out, it would be

unfair to apply the lump sum budgeting formula to non-recipients who have no notice of AFDC rules and regulations. While Congress could have enacted a lump sum policy which required retroactive consideration of lump sum income in determining eligibility for AFDC benefits, it was surely not required to do so by the Constitution.

E. REMEDY

The Court has determined that the defendant's lump sum policy violates the federal regulation requiring notice of AFDC eligibility requirements, 45 C.F.R. § 206.10(a)(2)(i). In order to remedy this violation, the defendant must take steps necessary to ensure that all AFDC recipients are aware of their budgeting responsibilities under the lump sum rule. Accordingly, the Court orders the defendant to forthwith prepare a notice explaining the lump sum policy, which shall be mailed to all current AFDC recipients. The defendant is further ordered to include such an explanation in the information which it provides to all individuals who apply for AFDC benefits. Finally, the explanation of the lump sum policy should also be included in the material that is given to recipients at the time of their periodic six-month reevaluation for benefits. The notice to AFDC recipients and applicants regarding the lump sum policy should provide a thorough explanation of the mechanics of the rule.

Plaintiffs have also requested that the Court order the defendant to notify all members of the class that their AFDC benefits may have been improperly terminated or denied under the challenged policy, and to afford them an opportunity to apply for corrective payments from their local welfare agencies. The Court agrees that this type of "notice relief" is warranted in this case. Under the Supreme Court's holding in *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court may not issue an order requiring the defendant to make retroactive payments of benefits that were improperly denied to members of the plaintiff class. Such an order is barred by the eleventh amendment. *Id.* In *Quern v. Jordan*, 440 U.S. 332 (1979), however, the Supreme Court sanctioned the type of notice relief requested by plaintiffs in the instant case. The notice that was approved in *Quern* was a "mere explanatory notice to

applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits." *Id.* at 336. In holding that an order mandating this type of notice is consistent with the eleventh amendment, the Supreme Court made the following comments:

The mere sending of that notice does not trigger the state administrative machinery. Whether a recipient of notice decides to take advantage of those available state procedures is left completely to the discretion of that particular class member; the federal court plays no role in that decision. And whether or not the class member will receive retroactive benefits rests entirely with the State, its agencies, courts, and legislature, not with the federal court.

Id. at 348 (footnote omitted).

The Court has determined that those members of the class who had their AFDC benefits terminated in violation of 45 C.F.R. § 206.10(a)(2)(i) should be given the opportunity to apply to the defendant for supplemental benefits which would make them whole.¹⁹ Accordingly, the defendant is ordered to prepare a notice which it will send to all those members of the class who have had their benefits terminated due to receipt of a lump sum since the adoption of defendant's policy. The purpose of this notice is simply to inform the class members that they may apply to defendant for correct payments. Defendant should prepare the notice in consultation with counsel for plaintiffs, and submit it to the Court for approval.

19. Members of the class such as Stewart, who did not expend any of their lump sum funds prior to receiving notice of the defendant's policy, did not have their benefits terminated in violation of the federal notice regulation.

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT

1. plaintiffs' motion for class certification is granted;
2. plaintiffs' motion for summary judgment is denied in part and granted in part;
3. defendant and third party defendant's motion for summary judgment are denied in part and granted in part;
4. defendant is to provide adequate advance notice to current AFDC recipients and applicants of the lump sum policy, in accordance with the Court's opinion; and
5. defendant is to notify all AFDC recipients whose benefits were terminated as a result of its lump sum policy, as defined by the class, that they have a right to apply for additional benefits, in accordance with the Court's opinion.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Judge Harry H. MacLaughlin
United States District Court

DATED: December 10, 1984

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION**

Sharon Slaughter,
Helen Stewart and
Kathryn Jenkins,
Plaintiffs,

v.

Leonard Levine,
in his capacity as
Commissioner of the
Minnesota Department of
Public Welfare,
Defendant and Third
Party Plaintiff,

v.

Margaret Heckler,
in her capacity as
Secretary, United States
Department of Health and
Human Services,
Third Party Defendant.

CIVIL 4-83-579

MEMORANDUM AND
ORDER

Mary Grau, Legal Aid Society of Minneapolis, Inc., 222 Grain Exchange Building, 323 Fourth Avenue South, Minneapolis, MN 55415, for plaintiffs.

Hubert H. Humphrey, III, Attorney General, State of Minnesota, and Vicki Sleeper, Special Assistant Attorney General, 515 Transportation Building, St. Paul, MN 55155, for defendant and third party plaintiff.

James M. Rosenbaum, United States Attorney, and Mary L. Egan, Assistant United States Attorney, 234 U.S. Courthouse, Minneapolis, MN 55401, Donna Morros Weinstein, Regional Attorney, Department of Health and Human Services, 300 South Wacker Drive, Chicago, IL 60606, and Lewis K. Wise, Wendy Kloner, Civil Division, Department of Justice, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530, for third party defendant.

This matter is before the Court on defendant's motion pursuant to Federal Rules of Civil Procedure 59(a) and 60(b) to reconsider the Court's Memorandum and Order of December 10, 1984.

FACTS

Plaintiffs in the instant action are recipients of Aid to Families with Dependent Children (AFDC) benefits who live in Minnesota. Plaintiffs brought this action on behalf of themselves and others similarly situated challenging the defendant Minnesota Department of Public Welfare's (DPW) policy regarding the receipt of lump sum income by AFDC recipients. Defendant's policy requires AFDC recipients who receive lump sum income to budget the sum for a predetermined number of months, during which time the recipient is ineligible for benefits.¹ In a Memorandum and Order dated December 10, 1984, the Court certified a class of plaintiffs² and ruled on cross motions for summary judgment which had been brought by the parties. The Court rejected plaintiffs' argument that defendant's lump sum policy violated the Social Security Act, 42 U.S.C. § 602(a) (7), or the due process or equal protection clauses of the Constitution. The Court did, however, hold that the failure to provide adequate written notice to plaintiffs of the lump sum policy constituted a violation of federal notice regulation, 45 C.F.R. § 206.10(a) (2) (i). In order to remedy this violation, the Court ordered the defendant to prepare a written notice explaining the lump sum policy, and to send this notice to all current AFDC

1. A more complete description of defendant's policy and of the factual background of this case can be found in the Court's Memorandum and Order of December 10, 1984. 598 F.Supp. 1035 (1984).

2. The class was defined as follows:

those individuals in the state of Minnesota who are otherwise eligible for AFDC benefits and who have been, or will be, found ineligible for AFDC benefits for a pre-determined number of months as a consequence of receipt of lump sum income by one of the members of an AFDC assistance unit of which they have been a member, and whose lump sum has or will become unavailable to them in whole or in part prior to their re-eligibility for benefits.

recipients and all applicants for AFDC benefits. Finally, the Court held that the defendant must give those members of the class whose benefits were terminated in violation of the regulation an opportunity to apply for corrective payments.

Defendant now moves the Court to reconsider its Memorandum and Order of December 10, 1984, pursuant to Fed.R.Civ.P. 59(a) and 60(b). Defendant raises a number of arguments in this motion. First, defendant contends that named plaintiff Kathryn Jenkins does not have standing to raise the notice issue. Second, defendant argues that oral notice of the lump sum rule, supplemented by written notice, would be preferable to the written notice ordered by the Court. In the alternative, defendant requests that the Court approve the proposed written notice which it has submitted to the Court. Third, defendant argues that the "notice relief" ordered by the Court, which would give class members the opportunity to apply to the defendant for corrective payments, violates the eleventh amendment. Finally, the defendant requests that the Court order the third party defendant Margaret Heckler, Secretary of the United States Department of Health and Human Services, to pay federal financial participation for any AFDC benefits paid to class members in accordance with the Court's December 10, 1984 Order.

DISCUSSION

A. Standing of named plaintiff Kathryn Jenkins

The Court allowed named plaintiff Kathryn Jenkins to intervene in this litigation on September 21, 1984, at the hearing on the parties' cross motions for summary judgment, pursuant to Fed.R.Civ.P. 24(b). Counsel for plaintiffs conceded at this hearing that the remaining named plaintiff, Helen Stewart, did not have standing to raise the regulatory and constitutional notice claims,³ and indicated that plaintiff

3. Plaintiff Stewart did not have standing to raise the notice claims on behalf of the class because she did not expend any of her lump sum funds prior to receiving notice of the defendant's policy.

Jenkins' intervention was designed to preserve those claims. The defendant requested an opportunity to conduct limited discovery regarding plaintiff Jenkins. The Court ordered that defendant could conduct discovery regarding Jenkins until November 15, 1984. Subsequent to the hearing, defendant served interrogatories on both Jenkins and the third party defendant. The defendant also reviewed Jenkins' welfare files, which were in the custody of Hennepin County. It is on the basis of this discovery that defendant argues that plaintiff Jenkins does not have standing to raise the notice claims on behalf of the class.

Plaintiff Jenkins applied and was found eligible for AFDC benefits in Hennepin County in November of 1982. Plaintiff's husband, who was disabled as a result of a job-related incident, had workers' compensation and social security disability claims pending at the time of the AFDC application. Plaintiff has stated in an affidavit that she advised the AFDC caseworker of these pending claims, but that she was not informed of the lump sum formula used by defendant. Plaintiff's husband received a lump sum of \$5,752 on October 31, 1983. According to plaintiff's affidavit, she never received notice of the lump sum rule prior to this date. Plaintiff reported the receipt of her lump sum to Hennepin County welfare authorities on November 2, 1983; by that time, plaintiff's family had spent the entire sum on, among other things, overdue mortgage payments and car repair bills. In her affidavit, plaintiff stated that it was during a conversation with her caseworker on November 2, 1983 that she was first advised of her budgeting responsibilities under the lump sum rule.

Defendant claims that evidence obtained during discovery establishes that plaintiff Jenkins did receive notice of the lump sum rule prior to the time she received and spent the lump sum in October and November of 1983. Plaintiff was an AFDC recipient in September of 1981, when the defendant sent a letter dated September 18 to all recipients which included the following information about the lump sum rule⁴:

4. The September 18 letter contained information on a number of other significant changes in AFDC rules resulting from the Omnibus Budget Reconciliation Act of 1981.

Lump Sum Money: When a family receives lump sum money such as an inheritance, a Social Security back payment, insurance settlements, gift, etc., the money will be deducted from the AFDC grant, whether or not it has already been spent. If the lump-sum added to other family income totals more than the AFDC maximum for that size family, the family will be ineligible for the month in which the lump sum was received (and possibly for a number of following months), whether or not the money is spent before the period of ineligibility has gone by. If the family already received an AFDC grant that month, the grant would be "recouped" by the welfare agency.

Defendant contends that plaintiff Jenkins lacks standing to raise the notice claims on behalf of the class because she received this letter. Plaintiff has submitted an affidavit in which she states that she does not remember receiving this letter.

The Court finds that plaintiff Jenkins has standing to raise the notice claims on behalf of the class, notwithstanding the fact that she may have received the September 18, 1981 letter. The Court's decision rests on two grounds. First, the description of the defendant's lump sum policy which was contained in the September 18 letter was simply inadequate. As the Court noted in its initial Memorandum and Order, "[t]his letter merely told recipients that receipt of a lump sum may 'possibly' affect their eligibility, without detailing the lump sum formula or its inflexible application...." Memorandum and Order of December 10, 1984 at 34-35; 598 F.Supp. at 1050. The defendant's letter contained neither a coherent explanation of the lump sum formula nor examples of its application. The Court finds that the letter's description of the lump sum policy is both incomplete and confusing. The fact that plaintiff Jenkins received this letter therefore does not mean that she lacks standing to raise the class notice claims.

The second ground for the Court's determination that plaintiff Jenkins has standing is that Jenkins received a lump sum subsequent to the September 18, 1981 letter which was not treated by defendant in a manner consistent with the explanation in the letter. Defendant stated in the letter that

the new lump sum policy, along with a number of other changes in AFDC policy, would take effect on October 1, 1981. As a result of litigation, however, the defendant was enjoined from implementing the new lump sum policy until February of 1982. *Minnesota Recipients Alliance v. Noot*, 527 F.Supp. 140 (D.Minn. 1981). Individuals who received lump sum income during the period between October of 1981 and February of 1982 were evaluated under the old policy, despite what the September, 1981 letter indicated. Therefore, the lump sum was treated as income in the month received and as a resource thereafter. Plaintiff Jenkins' husband received a partial workers' compensation settlement in December, 1981 and January, 1982 that was treated in this manner. Defendant did not calculate a period of ineligibility for plaintiff as a result of this lump sum. Rather, when plaintiff reapplied for benefits in November of 1982 after her family had exhausted the lump sum, she was found eligible after providing receipts which demonstrated how the lump sum had been spent.

Plaintiff Jenkins, like other individuals who received lump sum income during the period from October, 1981 to February, 1982, could only assume that the original policy regarding lump sums was still in effect, in light of the fact that her husbands' workers' compensation settlement was treated in accordance with the original policy. Even if the explanation of the new lump sum rule contained in the September, 1981 letter had been completely adequate, then, the notice would have still been ineffective because the rule was not implemented in accordance with the letter. The Court notes that defendant did not send any follow up notice to AFDC recipients explaining that the effective date of the new lump sum policy had been changed. Moreover, the defendant did not send any notice to recipients subsequent to the September, 1981 letter in an attempt to explain the lump sum rule. Defendant's claim that plaintiff Jenkins received effective notice of the new policy, and that she therefore lacks standing to raise the notice claims on behalf of the class, must therefore be rejected.

B. The notice requirement

Defendant moves the Court to reconsider its holding that defendant must provide all AFDC recipients and applicants with a written notice which explains the lump sum rule. Defendant contends that face-to-face communication is the most effective manner in which to inform AFDC recipients of technical program requirements, and that it should therefore only be required to provide advance oral notice of the lump sum rule (supplemented with written notice) to those recipients who either report the likelihood of a lump sum receipt or whose circumstances indicate such a likelihood.⁵ The Court will not alter the notice requirements set forth in its original Order.

There are a number of shortcomings with the defendant's proposed alteration of the Court's notice requirement. First, the federal notice regulation provides for oral explanations of AFDC policy as a supplement to written material, rather than vice versa, as the defendant proposes. 45 C.F.R. § 206.10(a)(2)(i) ("individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program, and related services available....") The Court notes that oral notice would be very hard to prove or disprove. Second, the notice regulation requires that information about the eligibility conditions for the AFDC program be provided uniformly to all applicants and recipients, rather than to selected individuals whom caseworkers determine are in need of the information. *Id.* Third, the defendant's proposal to give notice of the lump sum rule only to those individuals who anticipate the receipt of a lump sum is imminent, rests too heavily on the exercise of discretion of the individual caseworker. Even the most competent caseworker may on occasion forget to provide the required notice, or provide it in an untimely fashion. The defendant's proposal simply leaves too much room for error to constitute effective notice. Finally, as plaintiffs point out, AFDC recipients cannot always anticipate the receipt of a lump sum. Under the

5. Defendant does not object to the notice required by the Court on the grounds that it would pose administrative inconvenience or expense.

defendant's proposed notice scheme, a recipient who receives a lump sum with no advance warning would have no notice of the budgeting requirements of the lump sum rule. Such an individual might well not learn of the strict requirements of the lump sum rule until after he or she spends all or a portion of the lump sum. For the above reasons, the Court believes that the advance written notice of the lump sum rule required by its December 10, 1984 Order is the best way to ensure that all AFDC recipients and applicants are aware of their responsibilities under this critically important rule. The defendant should not hesitate, of course, to provide oral notice to those individuals who have received or will receive a lump sum.

Defendant has requested in the alternative that the Court approve the proposed written notice that it has provided to the Court. The first proposal which defendant submitted to the Court was an eight page document containing a wide range of information on a number of AFDC requirements, as well as information on other public assistance programs; the description of the lump sum was found on the third page of this document and was not highlighted in any way. Plaintiffs objected to this notice on the grounds that the information on the lump sum rule should be contained in a separate notice, and provided the Court with a proposed one page notice that clearly explains the particulars of the lump sum budgeting rule. Defendant has responded to this notice with a second proposal. This proposed notice is a single sheet with printing on both sides, entitled "IMPORTANT NOTICE ABOUT WHAT YOU SHOULD DO WHEN YOU HAVE INCOME, OR THINK YOU MIGHT HAVE INCOME IN THE FUTURE." The front of the sheet contains general information on AFDC recipients' rights and responsibilities regarding income reporting. The reverse side of the sheet contains a description of the lump sum rule which incorporates the plaintiffs' proposed language almost verbatim.

With some very minor modifications, the Court will approve the defendant's proposed notice. A copy of this notice is appended to this Order as Appendix A. The notice contains a clear exposition of the lump sum rule and is not unduly lengthy. Plaintiffs continue to object to the notice on the ground that the information explaining the lump sum rule

seems to get "lost" in the text. The Court believes that the defendant's proposal sufficiently draws the readers' attention to the lump sum information. Moreover, the defendant is entitled to a fair amount of deference when it comes to the question of notifying AFDC recipients about their rights and responsibilities under the program. While the Court has found that the federal regulations require defendant to provide advance written notice of the lump sum rule, the Court recognizes that the defendant possesses considerable expertise regarding administration of the AFDC program. The Court will therefore decline to dictate the precise parameters of the lump sum notice. The notice provided by the defendants, as modified by the Court, clearly satisfies the requirements of 45 C.F.R. § 206.10(a)(2)(i).

C. Defendant's eleventh amendment objections to "notice relief"

The Court's Order of December 10, 1984 did not order the defendant to pay retroactive AFDC benefits to any class members. Under the Supreme Court's decision in *Edelman v. Jordan*, 415 U.S. 651 (1974), such an order is clearly barred by the eleventh amendment. The relief which the Court ordered in its December 10 decision was rather the "notice relief" sanctioned by the Supreme Court in *Quern v. Jordan*, 440 U.S. 332 (1979); the defendant was simply ordered to notify class members that they may apply to the defendant for corrective payments. Defendant argues that this remedial order violates the eleventh amendment. The Court cannot agree. First, as the Supreme Court recognized in *Quern*, this type of order does not by itself trigger the state's administrative machinery; the decision whether to pursue corrective payments rests with each class member. Second, the decision whether to grant corrective payments rests entirely with the State, and not the federal court. It is clear that not all class members would be eligible for corrective payments under the Court's order. Third, the defendant has made no issue of the administrative expense associated with the preparation and mailing of the notice. The absence of administrative expense was a factor in the *Quern* decision. 440 U.S. at 335 n.3, 347 &

n.19, 349.⁶ Finally, the retroactive relief contemplated by the Court's order is incidental to a grant of prospective relief—the requirement that advance written notice be given. For the above reasons, the Court declines to alter the “notice relief” required by its December 10 Order. Accordingly, the defendant should prepare a notice to the members of the class regarding the opportunity to apply for corrective payments. A copy of such notice should be provided to counsel for the plaintiffs, and the notice should then be distributed to the class.

D. Federal financial participation

The AFDC program is designed as a “scheme of cooperative federalism” that is funded jointly by the federal government and participating states. *King v. Smith*, 392 U.S. 309, 316 (1968). In accordance with this scheme, the AFDC funding statute establishes a cost-sharing formula which allocates AFDC program costs between federal and state governments. 42 U.S.C. § 603. The payments made by the federal government toward legitimate AFDC program expenditures are referred to as “federal financial participation” (FFP). The state defendant in the instant action requests that the Court order the federal third party defendant to pay FFP for any benefits paid to class members in accordance with the Court's Order. The Court will grant defendant's request and order the third party defendant to pay FFP.

The Secretary of Health and Human Services' regulations provide that FFP is available for “[p]ayments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order.” 45 C.F.R. § 205.10(b)(3). The plain language of this regulation clearly requires the payment of FFP in the instant case.⁷ The federal

third party defendant has taken the position in this and other litigation that it has the discretion to decide whether it will pay FFP for court-ordered benefits. *Chu Drua Cha v. Noot*, CIV. 3-82-1017 (D.Minn.). The regulation in question admits of no such discretion, and has been interpreted to require FFP payments for benefits given by the state even when the federal defendant considers the benefits to be improper. *State of Georgia v. Heckler*, 583 F.Supp. 1377, 1380-81 (N.D.Ga. 1984) (state payment of Medicaid benefits pursuant to temporary federal court injunction a legitimate state expenditure requiring FFP). The United States Court of Appeals for the First Circuit has observed that the cooperative federalism structure of the AFDC program is ill-served when “the Secretary of HHS seeks to avoid sharing with the states both the burden of defending beneficiary suits and the financial consequences of an adverse judgement.” *Kozera v. Spirito*, 723 F.2d 1003, 1011 (1983). In the instant case, the state defendant is entitled to assurance that the federal third party will participate in any corrective payments made pursuant to the Court's Order. *Cf. Brogan v. Miller*, 101 F.R.D. 729 (N.D.Ill. 1984) (state defendant's third party complaint against federal agency dismissed where agency declared that court's orders were consistent with federal regulations and promised not to terminate FFP).

The defendant has a legitimate basis for feeling insecure about the payment of FFP in this case. The federal third party defendant has given no assurances that it will pay FFP, and it has taken several positions in this and similar litigation which indicate that it may not consider itself bound to pay FFP. Third party defendant has taken the position that prior written notice of the lump sum rule is not required by 45 C.F.R. § 206.10(a)(2)(i), and that its interests are not “implicated” by the adequacy of the notice claims asserted by the plaintiffs. In previous litigation, *Chu Drua Cha v. Noot*, the third party defendant has claimed that it has the authority to decline to pay FFP if court ordered benefits are attributable to the state's administration of the AFDC program, a claim which it could conceivably raise in the instant case. This latter argument has been rejected by several courts in analogous situations. *See, e.g., Bermudez v. United States Depart-*

6. The instant case is therefore distinguishable from *Colbeth v. Wilson*, 554 F.Supp. 539, 546 (D.Vt. 1982), *aff'd*, 707 F.2d 57 (2d Cir. 1983), a case cited by the defendant.

7. The Court stresses that while any corrective payments would be in accordance with the Court's December 10, 1984 Order, and thus within the scope of 45 C.F.R. § 205.10(b)(3), it has *not* ordered the state to make retroactive benefit payments.

ment of Agriculture, 490 F.2d 718 (D.C.Cir.), *cert. denied*, 414 U.S. 1104 (1973) (federal government financially responsible for restored benefits to food stamp recipients injured by state administrative errors); *Carter v. Butz*, 479 F.2d 1084, 1087 (3d Cir.), *cert. denied*, 414 U.S. 1094 (1973) (federal agency financially liable for restored benefits to recipients injured by state's error in delivery of food stamp cards). In short, defendant faces considerable uncertainty on the question of FFP. In view of the fact that defendant is clearly entitled to FFP, the Court will order the third party defendant to contribute its share of any corrective payments made to the class.

The third party defendant argues that the question of FFP is a matter which is not yet ripe for judicial review because the defendant has not exhausted the administrative procedures for the consideration of FFP claims set forth in 42 U.S.C. § 1316(d) and 45 C.F.R. Part 16, Appendix A, § B(a)(1). Defendant's response to this argument is that exhaustion of administrative remedies is inappropriate in the instant case. Defendant contends that exhaustion would be futile and would protract the litigation. The Court agrees. The requirement that administrative remedies be exhausted can be judicially waived where exhaustion would be futile or where the goals underlying the doctrine would not be futhered by its application. See *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *Kozera v. Spirito*, 723 F.2d 1003, 1010 (1st Cir. 1983); *State of New Jersey v. Department of Health and Human Services*, 670 F.2d 1262, 1277-78 (3d Cir. 1981); *Montgomery v. Rumsfeld*, 572 F.2d 250, 253 (9th Cir. 1978). The Supreme Court in *Weinberger* noted that

[e]xhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

422 U.S. at 765. A decision by the Court at this time that the third party defendant must pay FFP will not interfere with any of the above purposes of the exhaustion doctrine.

The FFP issue in this case is a legal question rather than a factual question. There is therefore no special need for agency expertise or for the development of a factual record sufficient for judicial review. Moreover, the legal question in this case is a straightforward one which is answered by the third party defendant's own regulations, 45 C.F.R. § 205.10(b) (3), so that judicial resolution of the issue at this time would not undercut any legitimate exercise of agency discretion. An administrative forum is simply not appropriate for a determination of whether the federal government should be required to reimburse the state for AFDC payments not required by a state plan but made in accordance with a court order. See *Women's Health Services, Inc. v. Maher*, 514 F. Supp. 265, 276 (D. Conn. 1981). The Court can see no reason to defer consideration of the FFP issue, especially given the fact that the state defendant is entitled to a clear picture of what responsibility it will bear for any corrective payments made in the case.

CONCLUSION

Based on the foregoing, **IT IS ORDERED** that:

1. the third party defendant is directed to pay federal financial participation (FFP) for any corrective payments made to class members in accordance with the Court's Order of December 10, 1984;
2. defendant's motion for reconsideration pursuant to Federal Rules of Civil Procedure 59(a) and 60(b) is in all other respects denied;
3. the notice attached to the Court's Order as Appendix A satisfies the requirements of 45 C.F.R. § 206.10(a) (2) (i), and should be distributed to AFDC recipients and applicants forthwith in the manner set forth in the Court's Order of December 10, 1984.

Judge Harry H. MacLaughlin
United States District Court

DATED: April 1, 1985

APPENDIX A

[information to be contained on front of notice form]

IMPORTANT NOTICE ABOUT WHAT YOU SHOULD DO WHEN YOU HAVE INCOME, OR THINK YOU MIGHT RECEIVE INCOME IN THE FUTURE

This sheet explains what you, as an AFDC recipient, should do when you receive income. This applies to income from earnings *and* income from other sources or people, including gifts, inheritances, government programs like veteran's benefits, workers' compensation, Social Security, and all other ways in which you might receive checks or cash.

It is *very important* that you read this sheet, *both the front and the back*. INFORMATION ABOUT LUMP SUM INCOME IS INCLUDED. It will give you some valuable help in knowing what you are supposed to do when you find out that you will be receiving a new kind of income that the welfare office doesn't know about yet. If you don't read it and then you find out what the rules are too late, you will risk:

- getting unnecessary reductions in your future AFDC grants because of overpayments that could have been avoided.
- losing a choice that you might have to have the income treated in a way that's better for you and your family.
- being penalized for not reporting, or for reporting late.
- being charged with fraud and, if convicted, suffering severe penalties.

TYPE OF INCOME

The two types of income are "earned" and "unearned" income.

"Earned" income is what you receive from working. When you have earned income, you are allowed to have some of it not deducted from your AFDC grant to cover work expenses and costs you have for day care, and, for a limited number of months, an extra amount to provide you with a work incentive bonus.

"Unearned" income generally means all other kinds of payments or money you receive that does not come from working. Some kinds of unearned income aren't counted by AFDC, but most are. Some kinds of unearned income can come regularly (like every month), or occasionally, or just once. Usually, it is hardest to remember to report

unearned income, and hardest to know ahead of time how each kind of unearned income will be handled in AFDC.

HOW TO REPORT "EARNED" INCOME

Earned income is the easiest to report. You always list it on your Household Report form that we send to you, usually each month. If you get a new job, lose a job, or have a change in your hours or hourly pay rate, you should let your financial worker know that is happening by calling or visiting the welfare office. If you think it *might happen*, you can call your worker to find out how that would affect your grant.

HOW TO REPORT "UNEARNED" INCOME

There are some kinds of unearned income that you should tell your worker about *before* you receive it. For example, if you are getting a loan, your worker can tell you what will be needed by AFDC so that the loan will not get counted against your grant. Another important example is with "lump sum" income—a kind of income that is usually a fairly large amount and that you will not be receiving regularly. In the case of lump sums, you have some *very important* choices that you can make that will benefit you and your family, but these must be made *before* you actually receive the payment. **READ THE LAST SECTION ON LUMP SUMS CAREFULLY FOR MORE INFORMATION.**

[information to be included on back of notice form]

Once you receive any unearned income, you must always report it on your Household Report form. Any time you want to know how a certain kind of unearned income will affect your AFDC grant, call or visit your financial worker.

YOUR RIGHT TO AN EXPLANATION OF THE AFDC PROGRAM'S RULES ABOUT INCOME

You have the right to know and understand the AFDC program's rules about income, whether you have already received the income or not. Your financial worker is required to tell you about policies in the program that could affect you, and what choices you have under the program that will be of benefit to you and your family or that will result in getting a higher grant. However, there are so many rules in AFDC that cover every possible situation that your financial worker can't

possibly tell you all of them in advance. **IT IS YOUR RESPONSIBILITY TO KEEP YOUR FINANCIAL WORKER INFORMED ABOUT YOUR SITUATION**—especially any income you might expect to start receiving—**SO THAT YOUR FINANCIAL WORKER CAN TELL YOU WHAT YOU CAN DO TO GET THE MOST BENEFIT FROM THE AFDC PROGRAM.** The last section on this sheet gives an example of one situation in which it is *very important* for you to find out the program's rules *before* you actually receive your income. This is especially important because the AFDC rules do change a lot, and the old rules that you know about may now be different.

LUMP SUM INCOME

Lump sum income is any cash payment that you do not receive every month, like workers' compensation settlements, personal injury settlements, back payments of Social Security disability benefits, inheritances, and so forth. If you or anybody in your family gets a lump sum while on AFDC, the county will apply the **LUMP SUM RULE** to your case.

Under the **LUMP SUM RULE**, you will be expected to save the money and live on it instead of receiving an AFDC grant for a period of months. This is call a **PERIOD OF INELIGIBILITY**. AFDC will use a formula to determine how long you will be expected to live on the lump sum money. The length of time you will be ineligible for AFDC will vary depending on the size of the lump sum.

Here is how the lump sum rule works. Assume that you have one child and no other income besides AFDC of \$431 per month. If you get an inheritance of \$4,310, AFDC will divide the amount of the lump sum—\$4,310—by the amount of your monthly grant—\$431—to produce a period of 10 months during which you and your entire family will be ineligible for AFDC. Your **PERIOD OF INELIGIBILITY** begins in the month in which you get the lump sum, and in this example would last for 10 months *regardless of what happens to the money in the meantime*. You will *not* be allowed to go back on AFDC until the period of ineligibility is over even if you have used up some of the lump sum money on expenses like back bills.

There are a few exceptions to the lump sum rule. That is why it is very important that you get in touch with your AFDC financial worker as soon as you think you may be receiving a lump sum. Your financial worker will be able to give you a more detailed explanation of how the lump sum rule applies to your individual case. If you don't know in advance that you will be getting a lump sum, you should contact your financial worker as soon as you receive the money. You should not spend any of the money until you talk to your financial worker.

If you receive lump sum income during a month when you are not on AFDC, then the lump sum rule does not apply. For example, if you stop receiving AFDC as of October 1st, and get a lump sum on October 6th, the lump sum rule isn't applicable. In that case, you could reapply for AFDC benefits as soon as the money was gone. **REMEMBER**, if you get a **LUMP SUM** while you are on AFDC, you'll be expected to live on the lump sum money until your **PERIOD OF INELIGIBILITY** has expired.

IF YOU HAVE ANY QUESTIONS, OR ARE NOT SURE ABOUT ANY OF THE RULES, CONTACT YOUR AFDC WORKER AND ASK.

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION**

Sharon Slaughter,
Helen Stewart
and Kathryn Jenkins,
Plaintiffs,

CIVIL 4-83-579

v.

Leonard Levine,
in his capacity as
Commissioner of the
Minnesota Department of
Public Welfare,
Defendant and
Third Party Plaintiff,

**MEMORANDUM
AND ORDER**

v.

Margaret Heckler,
in her capacity as
Secretary, United States
Department of Health and
Human Services,
Third Party Defendant.

Mary Grau, Legal Aid Society of Minneapolis, Inc., 222 Grain Exchange Building, 323 Fourth Avenue South, Minneapolis, MN 55415, for plaintiffs.

Hubert H. Humphrey, III, Attorney General, State of Minnesota, and Vicki Sleeper, Blake Shepard, Jr., Special Assistant Attorneys General, 515 Transportation Building, St. Paul, MN 55155, for defendant and third party plaintiff.

James M. Rosenbaum, United States Attorney, and Robert Small, Assistant United States Attorney, 234 U.S. Courthouse, Minneapolis, MN 55401, Donna Morros Weinstein, Regional Attorney, Department of Health and Human Services, 300 South Wacker Drive, Chicago, IL 60606, and Lewis K. Wise, Wendy Kloner, Civil Division, Department of Justice, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530, for third party defendant.

This matter is before the Court on defendant's motion to stay portions of the Court's December 10, 1984 and April 1, 1985 Orders and Judgment, pursuant to Federal Rule of Civil Procedure 62(c) and Federal Rule of Appellate Procedure 8(a). The defendant requests a stay of only those portions of the Court's Orders which require it to notify the members of the plaintiff class that their AFDC benefits may have been improperly terminated and that they may file administrative appeals in an attempt to recover supplemental payments.¹ After careful consideration of the memoranda and arguments of counsel, and all the files, records, and proceedings in this matter, the Court has concluded that a stay of its Orders is not warranted under the test set forth by the United States Court of Appeals for the Eighth Circuit in *James River Flood Control Association v. Watt*, 680 F.2d 543, 544 (8th Cir. 1980). Defendant's motion will accordingly be denied.

The defendant has devoted a significant portion of the memorandum in support of its motion to an argument that the "notice relief" ordered by the Court establishes a liability on the part of the State of Minnesota in violation of the eleventh amendment. See *Edelman v. Jordan*, 415 U.S. 651 (1974); *Quern v. Jordan*, 440 U.S. 332 (1979). The defendant essentially contends that the Court made certain "findings" which would somehow bind the State to pay money judgments to a specified group of class members in the event that they choose to pursue an administrative appeal. The Court has two brief comments to make with regard to this issue. First, the defendant has not prepared a proposed notice to the class members, as requested by both of the Court's Orders. The Court is confident that the defendant will draft a neutral notice which will be consistent with the demands of the eleventh amendment, as interpreted by the Supreme Court in

1. In its Orders, the Court also directed the defendant to prepare and distribute a notice to AFDC applicants and recipients explaining the requirements of the lump sum policy. The Court rested its decision that such notice was required on the federal regulation mandating that AFDC recipients be advised of the "conditions of eligibility." 45 C.F.R. § 206.10(a)(2)(i). Defendant has not requested a stay of this aspect of the Court's Orders.

Quern v. Jordan. Second, the Court did not intend by any of the comments which it made in connection with its holding that defendant violated the federal notice regulation to bind the defendant to make corrective payments to a certain, defined group. The "findings" of which the defendant complains are simply the Court's rationale for holding that the defendant should have provided advance written notice of the lump sum rule. Accordingly, the Court continues to believe that the "notice relief" remedy which it ordered does not violate the eleventh amendment.

Based on the foregoing, IT IS ORDERED that defendant's motion to stay is denied.

Judge Harry H. MacLaughlin
United States District Court

DATED: June 13, 1985

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION**

Sharon Slaughter,
Helen Stewart and
Kathryn Jenkins,
Plaintiffs,

v.

Leonard Levine,
in his capacity as
Commissioner of the
Minnesota Department of
Public Welfare,
Defendant and
Third Party Plaintiff,

v.

Margaret Heckler,
in her capacity as
Secretary, United States
Department of Health and
Human Services,
Third Party Defendant.

CIVIL 4-83-579

**MEMORANDUM AND
ORDER**

Mary Grau, Legal Aid Society of Minneapolis, Inc., 222 Grain Exchange Building, 323 Fourth Avenue South, Minneapolis, MN 55415, for plaintiffs.

Hubert H. Humphrey, III, Attorney General, State of Minnesota, and Vicki Sleeper, Special Assistant Attorney General, 515 Transportation Building, St. Paul, MN 55155, for defendant and third party plaintiff.

Francis X. Hermann, Acting United States Attorney, and Mary L. Egan, Assistant United States Attorney, 234 U.S. Courthouse, Minneapolis, MN 55401, and Lewis K. Wise, Wendy Kloner, Civil Division, Department of Justice, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530, for third party defendant.

This matter is before the Court on plaintiffs' motion for contempt, or in the alternative for supplemental relief. Plaintiffs' motion for contempt will be denied. Plaintiffs' motion for supplemental relief will be denied in part and granted in part.

FACTS

This case returns to the Court for the fourth time. Plaintiffs are a class of persons claiming deprivation of AFDC benefits due to defendant's failure to adhere to federal regulations in administering the "lump sum rule," 42 U.S.C. § 602(a)(17). The lump sum rule mandates that AFDC beneficiaries in receipt of lump sum income, defined as income from a non-recurring source,¹ be removed from AFDC rolls for a period of months equal to the amount of the lump sum income divided by the standard of need applicable to the recipient. *Id.*

In *Slaughter v. Levine*, 598 F.Supp. 1035 (D. Minn. 1984) (*Slaughter I*), the Court found that defendant had contravened federal regulations by failing to provide AFDC recipients with adequate notice of the lump sum rule and its effect on eligibility requirements. Specifically, the Court found that defendant had violated 45 C.F.R. § 206.10(a)(2)(i), which provides in relevant part that:

Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program, and related services available, and the rights and responsibilities of applicants for and recipients of assistance. Specifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in

1. See Minnesota Department of Public Welfare Instructional Bulletin, 82-3, Attachment 13. Included in defendant's definition of lump sums are gifts, inheritances, contributions, some insurance settlements, back pay, and profit sharing. Excluded from the definition are settlements from the sale of a homestead, divorce settlements, retroactive AFDC payments, and insurance settlements to pay medical bills or replace property loss. *Id.*

simple, understandable terms are publicized and available in quantity.

45 C.F.R. § 206.10(a)(2)(i). Accordingly, the Court enjoined defendant to mail notices (publicity notices) to current AFDC recipients explaining the lump sum rule. The Court further enjoined defendant to include publicity notices in the information which it provides to individuals who apply for AFDC benefits, and in the materials given to recipients at the time of their periodic six-month reevaluation for benefits. In addition, the Court enjoined defendant to prepare a notice (*Quern* notice) for mailing to all class members whose benefits had been terminated due to receipt of a lump sum for the purpose of informing them that they had the right to apply to defendant for corrective payments. *Slaughter I*, 598 F.Supp. at 1055.

Defendant subsequently brought a motion for reconsideration with respect to both the publicity notice and the *Quern* notice to class members. In *Slaughter v. Levine*, 605 F.Supp. 1242 (D.Minn. 1985) (*Slaughter II*), the Court approved defendant's draft publicity notice with certain minor modifications. The Court further ordered defendant to "prepare a notice to the members of the class regarding the opportunity to apply for corrective payments," *Slaughter II*, 605 F.Supp. at 1249, and to provide a copy of such notice to plaintiffs' counsel before distributing it to the class. *Id.*

Defendant then appealed to the United States Court of Appeals for the Eighth Circuit, at the same time moving for a stay of the judgment of this Court pending appeal. In an unpublished order dated June 13, 1985 (*Slaughter III*), the Court denied defendant's stay motion. Defendant subsequently prepared and mailed to county welfare offices the publicity notice approved by the Court in *Slaughter II*. Defendant also prepared a draft *Quern* notice, submitting it to plaintiffs' counsel on July 31, 1985.

Plaintiffs now move the Court for an order finding defendant in contempt. Plaintiffs raise objection to both the publicity notice and *Quern* notice prepared by defendant. Plaintiffs also seek a court order directing the defendant to eliminate the "overpayment" of class member Kathryn

Jenkins on the ground that Jenkins was not adequately notified of the lump sum rule. Finally, plaintiffs seek a "declaration" of the Court that *Slaughter I* mandates that class members who spent their lump sum income prior to notification of the lump sum rule are entitled to corrective payments from the defendant.

DISCUSSION

Publicity Notice

In *Slaughter II*, 605 F.Supp. 1242, the Court approved a draft publicity notice prepared by defendant, with certain minor modifications. See *Slaughter II* Appendix A, 605 F.Supp. at 1251-53 (text of the approved notice). On July 5, 1985, defendant sent publicity notices to county welfare offices with instructions to distribute them to AFDC applicants and recipients at six-month intervals. The notices sent on that date, however, were not identical to the notice approved by the Court in *Slaughter II*. Modification of the approved notice was made necessary, defendant contends, by certain amendments to Minnesota's AFDC program enacted by the Minnesota Legislature in the 1984-85 session.²

Plaintiffs do not dispute that the 1985 statutory amendments make necessary the addition of certain language to the publicity notice approved by the court in *Slaughter II*. Nor do plaintiffs raise material dispute to the language drafted by defendant. Rather, plaintiffs object to the *placement* of the amendatory language. Plaintiffs argue that the additional information should be inserted in the fifth paragraph of the second page of the notice, rather than the third paragraph of the second page, as drafted by defendant. Plaintiffs contend that as drafted by defendant, the amendatory language may

2. In general, the 1985 statutory amendments removed certain kinds of lump sum income from the operation of the lump sum rule, such as income from personal injury insurance settlements, 1985 Minn. Sess. Law. Serv. ch. 252, § 15 (West), and income spent on certain medical expenses. *Id.* The amendments also provide for recalculation of the length of the lump sum ineligibility period if the lump sum becomes unavailable or if the AFDC standard of need increases. *Id.*

cause confusion, in that paragraphs three and five both make reference to certain exceptions to the lump sum rule, without any indication whether the exceptions referenced are identical or distinct.

Paragraph 5 of plaintiffs' proposed publicity notice provides (amendatory language underlined):

There are a few exceptions to the lump sum rule. /*See below. That is why it is very important that you get in touch with your AFDC financial worker as soon as you think you may be receiving a lump sum. Your financial worker will be able to give you a more detailed explanation of how the lump sum rule applies to your individual case. If you don't know in advance that you will be getting a lump sum, you should contact your financial worker as soon as you receive the money. You should not spend any of the money until you talk to your financial worker.

*INSERT — There are some types of lump sums that are not subject to the rule. And under certain circumstances the period of ineligibility may be shortened.

Paragraph 3 of the publicity notice prepared by defendant provides (amendatory language underlined):

Under the LUMP SUM RULE, you will be expected to save the money and live on it instead of receiving an AFDC grant for a period of months. This is called a PERIOD OF INELIGIBILITY. AFDC will use a formula to determine how long you will be expected to live on the lump sum money. The length of time you will be ineligible for AFDC will vary depending on the size of the lump sum. There are some types of lump sums that are not subject to the lump sum rule. Under certain circumstances the period of ineligibility may be shortened. Ask your financial worker for more information about this.

The Court has examined the changes made by defendant, and finds that they do not raise an undue likelihood of confusion. It is not the province of the federal courts to oversee the day-to-day operations of the Minnesota Department of Public Welfare. The actions taken by defendant are entitled to

a fair amount of deference, *Slaughter II*, 605 F.Supp. at 1248, provided that they remain within the bounds set out by the Court's prior orders. Defendant's conduct here is of that character, and the modified notice drafted by defendant will be respected. Accordingly, the defendant may distribute those publicity notices already printed. Defendant is instructed to substitute plaintiffs' proposed draft, paragraphs 3-5, wherein the modifying language is placed in paragraph 5, rather than paragraph 3, in place of its own draft paragraphs 3-5 in all future publicity notices which defendant may print and distribute. The Court finds that some gains in clarity will be realized by the substitution of plaintiffs' proposed language in future notices. Defendant has indicated no objection to making this change.

Overpayment to Kathryn Jenkins

Kathryn Jenkins is a named plaintiff in this matter. Jenkins was found eligible for AFDC benefits in November, 1982. On October 31, 1983, plaintiff's husband received a disability payment in the amount of \$5,752. On that date plaintiff's husband expended \$3,863.75 of that amount to satisfy a mortgage arrearage, and \$1,366 to satisfy an overdue car repair bill. The remaining \$500-\$600 was spent on other bills and on clothing for plaintiff's children.

Plaintiff reported receipt of the disability settlement to Hennepin County welfare officials on November 2, 1983. On that date defendant was informed for the first time of the lump sum rule. On November 3, 1983, Hennepin County advised plaintiff that her AFDC benefits would be terminated as of December 1, 1983 through May, 1984, that she would remain ineligible until May 1984, and that her October and November, 1983 grants would be considered an overpayment.

From this decision of the Hennepin County welfare office plaintiff appealed. Plaintiff continued to receive AFDC payments during the pendency of the appeal. Defendant rejected plaintiff's appeal on August 9, 1984, notifying plaintiff on September 5, 1984 that she would be charged an overpayment of \$5,464, representing AFDC benefits received by plaintiff in October and November, 1983 and during the pendency of her appeal. *Slaughter I*, 598 F.Supp. at 1040.

Plaintiffs now move the Court for an order requiring defendant to eliminate the \$5,464 overpayment charged to Kathryn Jenkins. Plaintiffs argue that *Slaughter I-III* necessarily require such an outcome, inasmuch as Jenkins was a named plaintiff who expended lump sum income prior to receiving adequate notice of the lump sum rule.

Slaughter I-III did not in express terms require defendant to eliminate the Jenkins overpayment. In the *Slaughter* orders the Court left the decision whether to grant corrective payments entirely with the state.³ *Slaughter II*, 605 F.Supp. at 1248. Further, an order requiring the state to eliminate overpayments goes beyond the "notice relief" sanctioned by the Supreme Court in *Quern v. Jordan*, 440 U.S. 332 (1979). In that case the Supreme Court noted that a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the eleventh amendment. *Quern*, 440 U.S. at 337, citing *Edelman v. Jordan*, 415 U.S. at 663. Should the Court order elimination of the Jenkins overpayment, the resulting "liability" would be paid from public funds, albeit indirectly. "Overpayments" are defined by the federal regulations as AFDC benefits to which the recipient is not entitled. In order to recoup overpayments, defendant reduces the monthly AFDC grant (once reinstituted) until the full amount has been recovered. 45 C.F.R. § 233.20(a)(13). Under Minnesota law, recoupments are made at the rate of one percent of the grantee's monthly benefits if the overpayment is owing to agency error, and at a five percent rate if owing to grantee error. Minn. Stat. § 256.73, subd. 6. Defendant has agreed to treat the Jenkins' overpayment as one-owing to agency error.⁴

3. The Court notes in this regard that in a recent state administrative appeal decision a DHS referee found that the failure of Washington County welfare officials to adequately notify an AFDC recipient of the lump sum rule was grounds for reinstatement of the petitioner's AFDC benefits. See Washington Co. Appeals, Docket No. 11926 (7-31-85).

4. Recoupment may be made only to the extent that the reduced assistance payment, together with the grantee's liquid assets and total income after deducting actual work expenses equals at least 95 percent of the grantee's standard of need, 99 percent if the overpayment is due solely to agency error. Minn. Stat. § 256.73, subd. 6.

Thus, were the Court to grant the requested relief, the public fisc of the State of Minnesota would be reduced in the amount of one percent of plaintiff's monthly benefit. This, the Supreme Court has made clear, the Court may not do.⁵ See *Edelman*, 415 U.S. at 663 ("suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."); *Meiner v. Missouri*, 673 F.2d 969, 982 (8th Cir.), cert. denied, 459 U.S. 909, 916 (1982) (award of monetary damages against the state for past breach of legal duty barred by eleventh amendment). See also *Municipal Authority of Town of Bloomsburg v. Commonwealth of Pennsylvania, Dep't. of Environmental Resources*, 496 F.Supp. 686 (M.D.Pa. 1980) (eleventh amendment bars relief in form of an order directing state to pay money, not as a consequence of future compliance with federal law, but as a form of monetary compensation for past breach of legal duty).

Accordingly, plaintiffs' motion for an order eliminating the Jenkins overpayment will be denied.

Quern Notice

Plaintiffs also raise objection to the draft *Quern* notice prepared by defendant. Specifically, plaintiffs object to paragraph 2 on page 1 of defendant's draft, as set forth below:

The federal court ordered the state to notify families affected by the lack of publicity that they may try to obtain corrective payments by using state appeal procedures. The court did not decide whether any families affected by the lack of publicity are actually eligible for

5. Plaintiffs contend that the Court may enjoin defendant to comply with federal law in the future, even if that compliance entails some ancillary expenditures, citing *Edelman*, 415 U.S. at 668. With this general proposition of law the Court wholeheartedly concurs. The difficulty with plaintiffs' argument, however, is that it would require the Court to make a threshold determination that plaintiff Jenkins was entitled to corrective payments. The Court has made clear that this decision lies with the State. Put differently, an order requiring defendant to comply with federal law in the future would not aid plaintiff Jenkins, whose overpayment is the product of past allegedly illegal conduct of the defendant.

corrective payments under applicable federal and state law. The state took the position in the case that corrective payments are not available in this situation. No further relief is possible from the federal court.

Plaintiffs propose that the following language be substituted for defendant's paragraph 2:

The federal court has ordered the state to notify families affected by the lack of publicity that they have the right to apply for a corrective payment from their local welfare agency.

The essence of plaintiffs' objection is that paragraph 2 as drafted by defendant informs class members of their right to apply for corrective payments, while in the same instant informing class members that all applications for corrective payments will be denied. Plaintiffs contend that the defendant's failure to draft a "neutral" *Quern* notice constitutes contempt of the Court's order in *Slaughter I*.

In *Slaughter I* the Court ordered defendant to "prepare a notice which it will send to all those members of the class who have had their benefits terminated due to receipt of a lump sum since the adoption of defendant's policy." *Slaughter I*, 598 F.Supp. at 1055. In *Slaughter III* the Court stated that defendant was to "draft a neutral notice which will be consistent with the demands of the eleventh amendment" *Slaughter III* slip op. at 3. Defendant's draft is anything but neutral. As framed by defendant, the draft will inevitably discourage class members from applying for corrective payments. Defendant argues that because it does not intend to award corrective payments to any class members under any circumstances, the language of paragraph 2 of its draft is immaterial in any event. Defendant has missed the point. At issue here is not whether defendant will make corrective payments, but whether defendant has complied with the Court's order. Defendant was ordered to draft a neutral notice. The notice as drafted is not neutral.

Accordingly, defendant is ordered to modify its proposed *Quern* notice in the following manner. The last two sentences of paragraph 2, page 1 of defendant's draft, which state that:

The state took the position in the case that corrective payments are not available in this situation. No further relief is possible from the federal court.

shall be stricken. Paragraph 2 of page 1 of defendant's draft shall read as follows:

The federal court ordered the state to notify families affected by the lack of publicity that they may try to obtain corrective payments by using state appeal procedures. The court did not decide whether any families affected by the lack of publicity are actually eligible for corrective payments under applicable federal and state law.

As modified by this Order, defendant's draft *Quern* notice is approved for mailing to class members.

Class Members' Entitlement to Corrective Payments

Finally, plaintiffs seek an order of the Court declaring that *Slaughter I* created a substantive right to corrective payments in all class members who received and expended lump sum benefits prior to receiving adequate notice of the lump sum rule. Plaintiffs contend that defendant has predetermined that corrective payments will not be paid to class members. Plaintiffs seek the above-referenced order, not for the purpose of determining the eligibility for corrective payments of any particular class members, concededly impermissible under the eleventh amendment, but rather to guarantee that class members who do respond to the *Quern* notice will have their cases addressed by defendant on a case-by-case basis, and not via summary denial procedures.

The Court has twice declared that *Slaughter I* did not create a substantive right to corrective payments in any class members. Under the eleventh amendment, that decision rests entirely with the state. The purpose of the Court's order was simply to notify class members that there are existing state administrative procedures which they may wish to pursue. See, e.g., *Quern v. Jordan*, 440 U.S. 332, 349 (1979). Thus, in *Slaughter II* the Court declared that "[*Slaughter I*] did not

order the defendant to pay retroactive AFDC benefits to any class members." 605 F.Supp. at 1248, and in *Slaughter III* it was stated that the "Court did not intend . . . to bind the defendant to make corrective payments . . ." Slip op. at 3. To the extent that plaintiffs seek an order declaring that class members are entitled to corrective payments, plaintiffs' motion will be denied. That decision rests with the state. *Slaughter II*, 605 F.Supp. at 1248. In rendering those decisions, however, the state is obligated to consider each class member's application for corrective payments on the merits. Defendant has stated in open court that it will afford class members a case-by-case treatment of their claims. Accordingly, defendant is ordered to assess each class member's claim for corrective payments on the factual merits. The precise form which this review will take is best left to the state. It is to be hoped that future treatment of class members will be marked by some modicum of understanding and compassion, as befits a department dedicated to addressing the most basic human needs. At the very least, defendant can be expected to assure that all questions which class members may have are fully addressed.

CONCLUSION

Based on the foregoing, IT IS ORDERED that:

1. plaintiffs' motion for an order holding defendant in contempt is denied;
2. defendant is directed to modify the publicity notice as set forth in this Order at such time as the current supply of printed notices is exhausted;
3. plaintiffs' motion for an order requiring defendant to eliminate the overpayment to Kathryn Jenkins is denied;
4. defendant is directed to treat the Jenkins overpayment as one owing to agency error if and when recoupment is made;
5. defendant's proposed *Quern* notice as modified by this Order is approved for distribution to class members in the manner set forth in the Court's Order of December 10, 1984; and

6. defendant is directed to consider class members' applications for corrective payments on a case-by-case basis.

Judge Harry H. MacLaughlin
United States District Court

DATED: November 5, 1985

**UNITED STATES COURT OF
APPEALS
FOR THE EIGHTH CIRCUIT
JUDGMENT**

Nos. 85-5143/5437MN
Sharon Slaughter, etc.,
et al.,

Appellees,

v.

Leonard Levine, etc.,
Appellant.

Appeal from the
United States District
Court for the District of
Minnesota.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the district court is affirmed in part, reversed in part, and the cause is remanded for further proceedings consistent with the opinion of this Court.

September 10, 1986

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

10/3/86

**STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE
CENTENNIAL OFFICE BUILDING
ST. PAUL, MINNESOTA 55155**

September 18, 1981

Dear AFDC Family,

Many important changes will be coming to the AFDC program beginning this October 1st and during the months after. This letter is being written based on the latest information available from Washington. This information may be revised later as more details become known.

The changes we're writing about were signed into law by President Reagan on August 13, 1981, after being passed by the U.S. Congress. Many of these changes you have seen and heard discussed in the newspapers and on TV during the past year; now they are about to happen.

Almost everyone now receiving AFDC will be affected to some extent, although some persons and families will be affected much more so than others. Detailed information regarding the specific impact of the changes to your family, if your family is affected at all, will come from your financial worker at the county welfare agency in the near future. But because of the importance of these changes, we would like to give you this summary and the opportunity to begin considering your options—should it appear you will be affected.

Please note: This letter is not intended as a detailed explanation of all the changes; you must get that from your financial worker. There may be some changes which affect you which either are not mentioned at all or are mentioned only in general terms. You will receive a formal, written notice from your county welfare agency if and before any adverse action is taken; your right to appeal will be explained on that notice.

Please read the following carefully. These changes will take effect on October 1, 1981:

ELIGIBILITY

• **Lump Sum Money:** When a family receives lump sum money such as an inheritance, a Social Security back payment, insurance settlement, gift, etc., the money will be

deducted from the AFDC grant, whether or not it has already been spent. If the lump-sum added to other family income totals more than the AFDC maximum for that size family, the family will be ineligible for the month in which the lump sum was received (and possibly for a number of following months), whether or not the money is spent before the period of ineligibility has gone by. If the family already received an AFDC grant that month, the grant would be "recouped" by the welfare agency.

● **Unemployed Parent program:** Two parent families receiving AFDC under the Unemployed Parent program will have the parent who earned the greater income in the two years prior to application designated the "unemployed parent".

BUDGETING (GRANT CALCULATION)

● **Earned Income Tax Credit (the "EITC"):** The federal government offers this credit or payment to employed persons who support children and whose family income is less than \$10,000 per year. Such persons may either file for the credit when they complete their federal income tax statement or request that their employer include it on their paycheck by completing a "W-5" form. Under the new law, the AFDC grant will be based on the assumption that eligible employed persons will be receiving the EITC in their paychecks. This means many employed AFDC recipients will have an amount equal to their EITC subtracted from their monthly AFDC grant—whether or not they request it from their employer.

● **Work Expenses:** Employed persons will be allowed a flat \$75 deduction each month, or less if employed part-time. There won't be any other deductions for taxes, transportation, lunches, etc. (except for dependent care, as mentioned below).

● **Dependent Care Expenses:** If it is necessary to pay for the care of a child or incapacitated person in order to work, an employed person will be allowed the actual costs up to a maximum of \$160 a month for each dependent who receives AFDC.

● **"\$30 + 1/3" Work Incentive:** The "\$30 + 1/3" will be based on your **net** income rather than your gross income. This

will mean a smaller deduction from earnings and thus a smaller AFDC grant.

● **Retrospective Budgeting:** This means your grant will usually be based on your income and circumstances two months past. This isn't much different than now. But this does mean that when you start a job you may, even with the new earnings, receive your old grant amount for another month or two before adjustments are made. On the other hand, when you leave a job, there will be a two month gap between your last paycheck and an increase in your AFDC grant. There will no longer be "supplemental payments" to cover this gap. Other subtractions or "recoupments" may have to be made to later grants to pay back any overpayments made when your circumstances have changed.

● **Family Income Report:** Another change which goes along with the retrospective budgeting is that it will become much more important to return your Family Income Reports on time, which is by the 5th of the month. Your check may not only be delayed for a late income report, it can also be reduced as a penalty (you may lose your work "disregards"). To minimize the need to "recoup" overpayments and to prevent other errors, you will also be asked to report expected changes in advance.

● **Recoupment:** The welfare office will be permitted to consider your "liquid resources" and other factors which will have the effect of allowing a greater portion of your AFDC grant to be "recouped" or held back to repay previous overpayments. In some cases this will mean there may be no check at all for a given month.

● **\$10 Minimum Payment:** When someone's AFDC grant figures out to be less than \$10, no check will be issued that month. Medical Assistance will continue, though, and the family will still report its income in case it goes down—giving the family a grant of \$10 or more again. (This will not apply if your grant comes to less than \$10 due to recoupment or vendor payments.)

● **Vendor Payments:** More families can be placed on vendor payments for money mismanagement or if the family requests that the county welfare agency send money out of its AFDC grant directly to the landlord, utility company, etc.

- **Aliens:** The sponsors of persons admitted to the U.S. will be responsible for their needs similar to the way stepparents are responsible for their families on AFDC. This will **not** apply to most of the recent political refugee groups.

Other changes passed by Congress cannot, in our view, be implemented by October 1. In many respects these changes may affect you even more than what we've already listed, so please continue with your attention. (These changes could take effect anytime after October 1st.)

ELIGIBILITY

- **Family Gross Income Test:** Anytime the total income of a family exceeds 150% of the AFDC maximum for that size family, the family will not be eligible for a grant. The income total will include earnings (even those of children), other benefits such as Social Security, etc., but not the AFDC grant. This will affect employed AFDC families the most.

- **Resources:** A family's resources will be limited to a maximum of \$1000. We frankly don't know what will be included in this total yet, although we know that it will not include a home. Household furnishings and personal property will probably be included to some extent and the value of a motor vehicle will be limited.

- **Strikers:** Persons who are involved in a strike or work slowdown at the time they are applying for AFDC or on the last day of a month in which they received AFDC will be ineligible. If the person involved in the strike or slowdown is the person to whom the AFDC check is made out, then the whole family will be ineligible.

- **Unborn Children:** Unborn children will no longer be eligible for AFDC. Expectant mothers will become eligible if carrying their first child. A grant may be provided to assist with nutritional and layette needs.

- **Age of Children:** Children, once they become 18 years old, will continue to be eligible only if they are enrolled in a high school level program which they will complete by age 19.

BUDGETING

- **Limit on \$30 + 1/3 Work Incentive:** The \$30 + 1/3 work incentive (the deduction from earned income) will be

available for only 4 months after a person starts a job. After the 4 months, there won't be eligibility again until the person has been off AFDC for one full year.

- **Stepparents:** We cannot say with certainty what will be happening to "stepparents grants" because of a court suit that's still pending, but it appears the changes signed by the President will take effect at **some** time in the future. These call for the income and the child support obligations of the stepparent to be considered in determining the eligibility and amount of an AFDC grant. The procedure will probably be similar to the one used for the September grants to families with stepparents except the grant will be smaller in the future.

This is by no means a complete run-down of what will be happening to the AFDC program, but we do want to give you the benefit of what advance notice we can. As more becomes known, we will be giving detailed information to your local welfare agency. They in turn will be better equipped to answer your questions and to advise you. We will also be revising the AFDC Client Handbook, the AFDC pamphlet and the various forms so that they will once again provide reliable information to you.

To those of you who anticipate losing your eligibility for AFDC, may we remind you that you have the right to apply for Medical Assistance, Food Stamps, Emergency Assistance, General Assistance, General Assistance Medical Care, or Minnesota Supplemental Aid as appropriate. If you dispute the facts leading to the loss of your eligibility or the reduction of your grant, you also have the right to file an appeal. Finally, should your circumstances change, you may reapply for AFDC.

Sincerely,

Arthur E. Noot
Commissioner

AID TO FAMILIES WITH DEPENDENT CHILDREN NOTICE TO REPORT INCOME AND LUMP SUM PAYMENTS

IMPORTANT NOTICE ABOUT WHAT YOU SHOULD DO WHEN YOU HAVE INCOME, OR THINK YOU MIGHT RECEIVE INCOME IN THE FUTURE

This sheet explains what you, as an AFDC recipient, should do when you receive income. This applies to income from earnings **and** income from other sources or people, including gifts, inheritances, government programs like veteran's benefits, workers' compensation, Social Security, and all other ways in which you might receive checks or cash.

It is **very important** that you read this sheet, **both the front and the back**. INFORMATION ABOUT LUMP SUM INCOME IS INCLUDED. It will give you some valuable help in knowing what you are supposed to do when you find out that you will be receiving a new kind of income that the welfare office doesn't know about yet. If you don't read it and then you find out what the rules are too late, you will risk:

- getting unnecessary reductions in your future AFDC grants because of overpayments that could have been avoided.
- losing a choice that you might have to have the income treated in a way that's better for you and your family.
- being penalized for not reporting, or for reporting late.
- being charged with fraud and, if convicted, suffering severe penalties.

TYPES OF INCOME

The two types of income are "earned" and "unearned" income.

"Earned" income is what you receive from working. When you have earned income, you are allowed to have some of it to cover work expenses and costs you have for day care, and, for a limited number of months, an extra

amount to provide you with a work incentive bonus. These amounts are not deducted from your AFDC grant. "Unearned" income generally means all other kinds of payments or money you receive that does not come from working. Some kinds of unearned income aren't counted by AFDC, but most are. Some kinds of unearned income can come regularly (like every month), or occasionally, or just once. Usually, it is hardest to remember to report unearned income, and hardest to know ahead of time how each kind of unearned income will be handled in AFDC.

HOW TO REPORT "EARNED" INCOME

Earned income is the easiest to report. You always list it on your Household Report form that we send to you, usually each month. If you get a new job, lose a job, or have a change in your hours or hourly pay rate, you should let your financial worker know right away by calling or visiting the welfare office. If you think it **might happen**, you can call your worker to find out how that would affect your grant.

HOW TO REPORT "UNEARNED" INCOME

There are some kinds of unearned income that you should tell your worker about **before** you receive it. For example, if you are getting a loan, your worker can tell you what will be needed by AFDC so that the loan will not get counted against your grant. Another important example is with "lump sum" income—a kind of income that is usually a fairly large amount and that you will not be receiving regularly. In the case of lump sums, you have some **very important** choices that you can make that will benefit you and your family, but these must be made **before** you actually receive the payment. **READ THE LAST SECTION ON LUMP SUMS CAREFULLY FOR MORE INFORMATION.**

Once you receive any unearned income, you must always report it on your Household Report form. Any time you want to know how a certain kind of unearned income will affect your AFDC grant, call or visit your financial worker.

YOUR RIGHT TO AN EXPLANATION OF THE AFDC PROGRAM'S RULES ABOUT INCOME

You have the right to know and understand the AFDC program's rules about income, whether you have already received the income or not. Your financial worker is required to tell you about policies in the program that will be of benefit to you and your family or that will result in getting a higher grant. However, there are so many rules in AFDC that cover every possible situation that your financial worker can't possibly tell you all of them in advance. **IT IS YOUR RESPONSIBILITY TO KEEP YOUR FINANCIAL WORKER INFORMED ABOUT YOUR SITUATION**—especially any income you might expect to start receiving—**SO THAT YOUR FINANCIAL WORKER CAN TELL YOU WHAT YOU CAN DO TO GET THE MOST BENEFITS FROM THE AFDC PROGRAM.** The last section on this sheet gives an example of one situation in which it is **very important** for you to find out the program's rules **before** you actually receive your income. This is especially important because the AFDC rules do change a lot, and the old rules that you know about may now be different.

LUMP SUM INCOME

Lump sum income is any cash payment that you do not receive every month. Examples are: workers' compensation settlements, personal injury settlements, back payments of Social Security disability benefits, inheritances, and so forth. If you or anybody in your family gets a lump sum while on AFDC, the county will apply the LUMP SUM RULE to your case.

Under the LUMP SUM RULE, you will be expected to save the money and live on it instead of receiving an AFDC grant for a period of months. This is called a **PERIOD OF INELIGIBILITY**. AFDC will use a formula to determine how long you will be expected to live on the lump sum money. The length of time you will be ineligible for AFDC will vary depending on the size of the lump sum.

Here is how the lump sum rule works. Assume that you have one child and no other income besides AFDC of \$431 per month. If you get an inheritance of \$4,310, AFDC will divide the amount of the lump sum by \$431 to produce a period of ineligibility of 10 months regardless of what happens to the money in the meantime. You will **not** be allowed to go back on AFDC until the 10-month period of ineligibility is over even if you have used up some of the lump sum money on expenses like back bills.

There are a few exceptions to the lump sum rule. There are some types of lump sums that are not subject to the rule, and under certain circumstances the period of ineligibility may be shortened. That is why it is very important that you get in touch with your AFDC financial worker as soon as you think you may be receiving a lump sum. Your financial worker will be able to give you a more detailed explanation of how the lump sum rule applies to your individual case. If you don't know in advance that you will be getting a lump sum, you should contact your financial worker as soon as you receive the money. You should not spend any of the money until you talk to your financial worker.

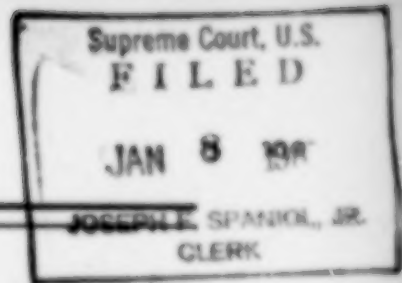
If you receive a lump sum income during a month when you are not on AFDC, then the lump sum rule does not apply. For example, if you stop receiving AFDC as of October 1st, and get a lump sum on October 6th, the lump sum rule isn't applicable. In that case, you could reapply for November AFDC benefits if the money is gone. REMEMBER, if you get a LUMP SUM while you are on AFDC, you'll be expected to live on the lump sum money until your PERIOD OF INELIGIBILITY has expired.

IF YOU HAVE ANY QUESTIONS, OR ARE NOT SURE ABOUT ANY OF THE RULES, CONTACT YOUR AFDC WORKER AND ASK!

OPPOSITION BRIEF

No. 86-978

4



In the
Supreme Court of the United States
October Term, 1986

SANDRA GARDEBRING, Commissioner of the
Minnesota Department of Human Services,
Petitioner,

vs.

KATHRYN JENKINS,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LAURIE N. DAVISON
Law Offices of the Legal
Aid Society of Minneapolis
222 Grain Exchange Building
323 Fourth Avenue South
Minneapolis, Minnesota 55415
(612) 332-1441

Counsel for Respondent

QUESTIONS PRESENTED

1. Did the State of Minnesota Department of Human Services violate federal law by failing to adequately inform plaintiff and her class how lump sum income would be treated in the AFDC program?

2. Did the existence of an effective date for the federal law changing the treatment of lump sum income in the AFDC program preclude the lower Court from fashioning a remedy for the named plaintiff?

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NO. 86-978

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

SANDRA GARDEBRING, Commissioner of the
Minnesota Department of Human Services,

Petitioner,

vs.

KATHRYN JENKINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Kathryn Jenkins, respectfully requests that this Court deny the petition for the writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 801 F.2d 288 (8th Cir. 1986).

STATEMENT OF THE CASE

Respondent submits this Statement to supplement the Statement presented by the petitioner with information relevant to the question of whether the Supreme Court should grant certiorari.

I. Additional Facts about Kathryn Jenkins and the Lump Sum Rule.

Kathryn Jenkins applied for Aid to Families with Dependent Children (hereafter AFDC) for herself, her disabled husband and their four children in November of 1982. At the time of her November, 1982 application for AFDC, Ms. Jenkins informed the welfare department that Mr. Jenkins had filed claims for workers' compensation and Social Security disability benefits. Ms. Jenkins was not given any information about how lump sum income would affect their AFDC eligibility.

On October 31, 1983 Raymond Jenkins received a retroactive Social Security disability payment of \$5,752.00. Ms. Jenkins called her welfare department caseworker two days later to report receipt of the disability award. During this phone conversation, Ms. Jenkins learned for the first time that she and her family were expected to live on the lump sum funds for a predetermined period of time.

By that time, however, the money had been spent. Most of the money was used to pay the arrearage on their home mortgage and an overdue car repair bill; the remainder of the money went to pay other bills and to buy winter clothes for the Jenkins children.

The Jenkins family was notified in November of 1983 that as a result of Mr. Jenkins's receipt of the disability

award, the family's October and November, 1983 AFDC grants would be considered an overpayment, their ongoing benefits would end December 1, 1983, and the family would be ineligible for AFDC until May of 1984.

Kathryn Jenkins filed an administrative appeal from that action. Because her appeal was filed timely, her family's AFDC benefits were continued pending the outcome of the appeal. 45 C.F.R. §205.10(a)(6)(1985).

Subsequently a state appeals referee recommended that the agency's action be reversed. The Deputy Commissioner of DHS, however, refused to accept the referee's recommendation and on August 9, 1984, affirmed the termination decision. Since the final administrative appeal decision was issued after the family's period of ineligibility had expired,

there was no interruption of AFDC assistance. Instead, the Jenkins family was charged with an overpayment of \$5,464.00. On September 7, 1984, having exhausted her administrative remedies, Ms. Jenkins intervened in the instant lawsuit.

The treatment of lump sum income in the AFDC program underwent a substantial change as a result of the OBRA legislation. Prior to February 1, 1982, a lump sum was considered income in the month received and a resource thereafter. Receipt of a lump sum generally caused an overpayment in the month received. If, however, the lump sum was spent before the next month, the family remained eligible for AFDC because its resources did not exceed established limits. Thus there was an incentive to spend the lump sum as soon as possible after receipt.

Under the new lump sum rule, the lump sum is deemed available for a predetermined number of months depending on the size of the lump sum, and the family is ineligible for AFDC for that entire period of time.

Kathryn Jenkins and her family had been recipients of AFDC in September of 1981 and presumably received the State's September 18th letter. Ms. Jenkins was terminated from AFDC after receiving lump sum income in December, 1981 and January, 1982. When she reapplied for AFDC in November of 1982 after her family had exhausted the lump sum, she was found eligible. She was required to provide receipts to demonstrate that the money had been spent and that her resources did not exceed the established limit, but the new lump sum rule establishing a fixed

number of months of ineligibility was not applied.

The sole effort made by the State to explain the new lump sum rule was the letter sent to recipients of AFDC on September 18, 1981. No written explanation was ever given to subsequent applicants for AFDC.

Both the District Court and the Court of Appeals considered whether the September 18th letter complied with the federal regulation requiring notice of eligibility rules, 45 C.F.R. §206.10(a)(2)(i)(1985), and concluded that it did not. The September 18th letter contained false information. It stated that the new lump sum rule would take effect October 1, 1981. In fact, the rule did not take effect until February 1, 1982. Ms. Jenkins and others who received lump sums between October, 1981 and February,

1982 could only assume that the former policy of treating lump sums as a resource remained in effect. The State never followed up the September 18th letter to explain that the changes had taken effect on February 1, 1982. Moreover, the September 18th letter simply did not describe the operation of the new lump sum rule.

II. The State Failed to Challenge the Applicability or Enforceability of the Notice Regulation.

This action was brought against the Commissioner of the Department of Human Services as the sole defendant. The Commissioner filed a third-party complaint against the Secretary of the United States Department of Health and Human Services, alleging two causes of action. First, the Commissioner argued that the federal regulation, which required that the new lump sum rule be

applied to income which was unavailable because it had been stolen, violated federal law.¹ Second, the Commissioner claimed that if he was liable for additional AFDC expenditures to plaintiffs and their class, the Court should order the Secretary to pay the federal share. Third-Party Complaint (August 1, 1983). The State did not then or subsequently argue that the regulation requiring written notice of AFDC eligibility requirements was inapplicable or unenforceable because of the effective date provision in the new law.

¹This claim became moot when the claim of Sharon Slaughter, the only plaintiff whose lump sum had been stolen, was settled.

**III. The Federal Government Did
Not Support the State's Position.**

In the District Court, the Secretary filed a cross-motion for summary judgment and a supporting memorandum on September 7, 1984. In a footnote, the Secretary stated:

Plaintiffs also challenge the adequacy of the notice they received from the State of Minnesota. HHS is not implicated in this claim and the third-party defendant has not responded to it in this memorandum.

Federal Third-Party Defendant's Memorandum in Support of Motion for Summary Judgment at 3 n. 2.

On or about December 20, 1984, the Commissioner moved for reconsideration of the Court's December 10, 1984 Memorandum and Order. The Commissioner asked the Court, among other things, to order the Secretary to pay the federal share of benefits restored to class members as a

result of its Order. On April 1, 1985, the Court, over the Secretary's opposition, ordered the Secretary to pay the federal share for any corrective payments made to class members in accordance with its December 10, 1984 Order.

Although the Secretary appealed from the District Court's Memoranda and Orders, her appeal was subsequently withdrawn. A-7, n. 8. The Secretary did not participate in the appeal of this case to the Eighth Circuit.

REASONS FOR DENYING THE PETITION

This case does not raise substantial questions appropriate for Supreme Court review. The decision below does not conflict with Supreme Court precedent, and there is no conflict among the Circuit Courts of Appeal. Moreover, the impact of the decision is extremely

limited. The decision will directly affect the plaintiff and no more than forty-one other AFDC families in Minnesota.²

I. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH ANY DECISIONS OF THE SUPREME COURT OR OTHER COURTS OF APPEAL AND DOES NOT RESOLVE QUESTIONS OF FEDERAL LAW SIGNIFICANT ENOUGH TO WARRANT SUPREME COURT REVIEW.

The Court below held that the State did not comply with the requirements of the federal regulation governing advance written notice of conditions of eligibility for AFDC. The decision is based on

²According to counsel for the petitioner, "there are approximately 32 AFDC lump sum appeals awaiting a final order by the Commissioner, 26 of which specifically raise the . . . notice issue. In addition, there are approximately 9 lump sum administrative decisions . . . that have been appealed to the district court." Letter from Special Assistant Attorney General Blake Shepard to Laurie N. Davison dated December 9, 1986.

the undisputed facts of this particular case. The Court carefully analyzed the notice which the State did send to some (but not all) class members and concluded that the State had violated the federal regulation. The Court below simply applied a federal regulation to a particular set of facts.

The State does not argue that the decision below conflicts with any decisions of the Supreme Court or other Courts of Appeal. The only claim made by the State is that the decision below conflicts with "principles" of previous Supreme Court cases. The following discussion will establish that the decision below does not conflict with the "principles" enunciated in prior Supreme Court cases.

The State relies almost exclusively on Atkins v. Parker, 472 U.S. 115, 105 S.Ct. 2520 (1985). The Atkins decision upheld the adequacy of a notice advising food stamp recipients of a change in the federal law. The recipients had claimed that the notice violated a food stamp regulation and due process.

The notice which was challenged and upheld in Atkins is precisely the kind of notice which the Court below found necessary to explain the lump sum rule. In Atkins, the State had notified all food stamp recipients that a change in federal law had reduced the disregard of earned income from twenty percent to eighteen percent, and that as a result, their food stamp benefits might be reduced or terminated. The Supreme Court held that the food stamp regulations at issue required the kind of notice the state had given,

but did not require a particularized notice detailing the impact in food stamp dollars on each individual family.

The decision below, which was based on a different regulation, did not require a particularized notice detailing the precise impact of the lump sum rule for each AFDC family. Rather, the Court below concluded that Minnesota had failed to adequately inform AFDC applicants of the general rule which would be applied to all lump sum income under the new law. Even those class members who received the September 18th notice were not informed that lump sum income would cause AFDC ineligibility for a rigid predetermined number of months, and that they would be expected to use the lump sum to replace their normal AFDC grant. The decision below cannot be considered contrary to

any principle enunciated by this Court in Atkins.

Moreover, the decision of the Court below was based solely on its interpretation, supported by HHS, of a federal regulation. Neither the District Court nor the Court of Appeals reached the issue of whether plaintiff's due process rights had been violated. Since Atkins dealt primarily with the requirements of due process, it is inapposite. A-9, n. 9.

The State also claims that the decision below conflicts with the principles of Lyng v. Payne, __ U.S. __, 106 S.Ct. 2333 (1986). The overriding principle enunciated by the Supreme Court in Lyng v. Payne, supra, is that an agency's construction of its own regulations is entitled to deference. 106 S.Ct. at 2341-2. The decision below was entirely

consistent with this well established principle. A-10, n. 10.

In its effort to convince this Court that the petition for certiorari should be granted, the State argues that the decision below will cause the downfall of the ability of states throughout the country to administer public assistance programs. Petition for a Writ of Certiorari at 8-9, 11-13. This is nonsense. The regulation in question has been in effect since 1978. If states were having difficulty complying with it, there surely would have been some court decisions addressing the scope of the regulation and applying it to particular facts before now. Nor have the decisions below apparently generated any litigation. The District Court decision granting summary judgment to the plaintiff was issued over two years ago, yet the State

points to no other court decisions relying on the regulation in question. The State's attempt to predict the vast precedential effects of the lower Court's decision is pure speculation. Finally, as noted by the Court below, the Secretary considered and rejected arguments concerning administrative inconvenience at the time the regulation was promulgated. A-13. If Minnesota or any other state finds the regulation overly burdensome, it can petition HHS to change the regulation.

What is involved here is the application of a federal regulation to a particular set of facts. Since the decision below does not conflict with any decisions of the Supreme Court or Courts of Appeal, and it will directly affect no more than forty-two AFDC families in

Minnesota, the petition for a writ of certiorari should be denied.

II. THE RELIEF GRANTED TO KATHRYN JENKINS WAS REASONABLE, DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT, AND DOES NOT RAISE AN IMPORTANT ISSUE OF FEDERAL LAW

The State of Minnesota, relying on language in the dissenting opinion below, argues for the first time that because Congress established an effective date for implementation of the new lump sum statute, the effective date must take precedence over all preexisting requirements. Neither the State nor the dissent cited any case law in support of this argument.

All statutes have effective dates. If Congress intends that the effective date provision is to abrogate all preexisting procedural requirements, it must say so either in the statute itself

or in the legislative history. In the instant case, the only available evidence indicates that Congress intended the effective date to be flexible. Instead of mandating a single effective date in all states, Congress authorized a later effective date where state law prevented compliance with the federal amendments. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, §2321, 95 Stat. 357, 859-60 (1981) reprinted in Petition for a Writ of Certiorari at 3.

Moreover, in the instant case, the overriding Congressional intent in enacting the new lump sum rule would have been frustrated without the relief ordered by the Court below. Congress intended to force recipients to budget their lump sum income and use it in the same manner as they would have used their AFDC benefits. A-11. Without actual notice of the

change in the lump sum rule, AFDC recipients like Kathryn Jenkins could not have been expected to spend their lump sum income as if it were AFDC benefits.

The problem facing the Court below was to fashion appropriate relief for a violation of federal regulations. As the lower Court noted, the relief granted was consistent with relief granted in other Circuits in comparable situations. A-22, citing Buckhannon v. Percy, 708 F.2d 1209, 1216 (7th Cir. 1983), cert. denied, 465 U.S. 1025 (1984); Kimble v. Solomon, 599 F.2d 599 (4th Cir. 1979), cert. denied, 444 U.S. 950 (1979). See also Eder v. Beal, 609 F.2d 695 (3d Cir. 1979). The determination of appropriate relief must be made on a case by case basis; absent conflict with Supreme Court precedent or a clear split among the

Circuits, it is not appropriate for
Supreme Court review.

CONCLUSION

The petition for a writ of
certiorari in this matter should be
denied.

Dated this 8th day of January,
1987.

Respectfully submitted,

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BRIEF

(5)
No. 86-978

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

SANDRA GARDEBRING, COMMISSIONER OF THE
MINNESOTA DEPARTMENT OF HUMAN SERVICES,
PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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BRIEF FOR THE UNITED STATES
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QUESTION PRESENTED

Whether 45 C.F.R. 206.10(a)(2)(i) requires a state to provide advance written notice to applicants for and recipients of benefits under the Aid to Families with Dependent Children program concerning the mechanics and effects of the so-called "lump-sum" rule of 42 U.S.C. 602(a)(17).

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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

This brief is submitted in response to the Court's
order inviting the Solicitor General to express the
views of the United States.

STATEMENT

1. The Aid to Families with Dependent Children
(AFDC) part of the Social Security Act (Title IV,
Part A of the Act, 42 U.S.C. (& Supp. III) 601 *et*
seq.) establishes a cooperative federal-state assistance
program. Participating states provide financial sup-
port to needy dependent children and the persons who
care for them; in return, the federal government par-

tially reimburses the states for the expenses they thereby incur. The AFDC program is designed to "encourag[e] the care of dependent children in their own homes * * * and to help [those children's] parents or relatives to attain or retain capability for the maximum self-support and personal independence * * *" (42 U.S.C. 601).

States participate in the AFDC program at their option and, at the present time, all states have chosen to do so. As a requirement of participation, each state has formulated and administers an assistance plan that conforms with the requirements of the statute and with the implementing rules and regulations of the Secretary of Health and Human Services (Secretary). See 42 U.S.C. (Supp. III) 602(a); see generally 45 C.F.R. 201.0 *et seq.* In conformity with these requirements, each state has established a statewide standard of need, "which is the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level." *Shea v. Vialpando*, 416 U.S. 251, 253 (1974). Furthermore, each state has specified "how much assistance will be given, that is, what 'level of benefits' will be paid." *Rosado v. Wyman*, 397 U.S. 397, 408 (1970). And, in administering its assistance plan, each state distinguishes between a family's "resources" and its "income": If the family's "resources" or "income" in a given month exceeds state-specified limits (subject to federally prescribed maximums), the state cannot provide the family with AFDC benefits that month. See 42 U.S.C. (Supp. III) 602(a)(7)(B), (17), and (18); 45 C.F.R. 233.20(3)(i)(B).

Prior to 1981, the states were required to treat all "income" or "resources" received in one month as "resources" in succeeding months—until the money

was spent. See *Lukhard v. Reed*, No. 85-1358 (Apr. 22, 1987), slip op. 2 (plurality opinion). This, however, had an anomalous effect on any family that received a nonrecurring lump sum payment (*e.g.*, a retroactive social security payment, an inheritance, a lottery winning, or a personal injury award). The family had to spend the lump sum receipt as quickly as possible or face potential disqualification from AFDC benefits (because their "resources" might exceed allowable limits). See *ibid.*; see also S. Rep. 97-139, 97th Cong., 1st Sess. 505 (1981). Thus, although the statute was designed to encourage AFDC families to budget their monies responsibly, its treatment of lump sum receipts had the opposite effect.

Accordingly, in 1981, the Secretary recommended that Congress amend the statute's treatment of lump sum receipts. *Lukhard v. Reed*, slip op. 2. Specifically, the Secretary proposed that the states be required to prorate that part of a family's income which exceeds the state's monthly standard of need over a period of months—determined by dividing all lump sum receipts and other countable income by the applicable monthly need standard. See *ibid.* Congress concurred in the Secretary's suggestion and, in August 1981, enacted the Secretary's proposed "lump sum" rule (and other proposed changes in the AFDC program) into law. See Section 2304 of the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 845 (42 U.S.C. (Supp. III) 602(a)(17)). Congress provided that the new lump sum rule would "become effective on October 1, 1981," unless the Secretary determined that state law prohibited compliance with it, in which case the rule would "become effective * * * the first month * * * after October 1, 1981" (Section 2321(a) and (b), 95 Stat. 859-860).

2. Petitioner, the Commissioner of the State of Minnesota's Department of Public Welfare,¹ then sent a letter, on September 18, 1981, to all current AFDC recipients in Minnesota informing them, among other things, that the new lump sum rule had been enacted (Pet. App. A97-A101). This letter explained that the lump sum rule could render families who received a lump sum temporarily ineligible for AFDC benefits, that the new rule would become effective on October 1, 1981, and that AFDC caseworkers could provide additional information concerning the rule's operation (*id.* at A97-A98).² Because of a separate piece of litigation, however, petitioner did not actually implement

¹ At the time, Leonard Levine was the Commissioner of the Minnesota Department of Public Welfare. Petitioner Sandra Gardebring is Mr. Levine's successor in office.

² The letter explained (Pet. App. A97-A98) that, "[w]hen a family receives lump sum money such as an inheritance, a Social Security back payment, insurance settlement, gift, etc., the money will be deducted from the AFDC grant, whether or not it has already been spent. If the lump-sum added to other family income totals more than the AFDC maximum for that size family, the family will be ineligible for the month in which the lump sum was received (and possibly for a number of following months), whether or not the money is spent before the period of ineligibility has gone by. If the family already received an AFDC-grant that month, the grant would be 'recouped' by the welfare agency."

The letter further stated (Pet. App. A97 (emphasis omitted)) that, "[t]his letter is not intended as a detailed explanation of all the changes; you must get that from your financial worker. There may be some changes which affect you which either are not mentioned at all or are mentioned only in general terms. You will receive a formal, written notice from your county welfare agency if and before any adverse action is taken; your right to appeal will be explained on that notice."

the new lump sum rule until February 1, 1982 (Pet. App. A4).

Respondent, the representative of a class of AFDC recipients in Minnesota who either had been or would be found ineligible for AFDC benefits because of the lump-sum rule, filed this action against petitioner in July 1983 (Pet. App. A5). Respondent alleged that the new "lump sum" rule violated the Social Security Act and the equal protection and due process guarantees of the Constitution and, in addition, that petitioner had not provided the plaintiff class with adequate advance notice of the lump sum rule's mechanics and operation (*ibid.*). Petitioner responded by, among other things, filing a third-party complaint against the Secretary, demanding that the federal government bear a proportionate share of any liability incurred in the implementation of the lump sum rule (*id.* at A5, A7).

The district court certified the plaintiff class and granted partial summary judgment to it (Pet. App. A5-A8, A27-A59, A61-A77, A79-A81, A83-A94). The court rejected the plaintiff class's claim that the lump sum rule is inconsistent with the Social Security Act or the Equal Protection and Due Process Clauses (*id.* at A5-A6, A40-A47, A51-A57). But it agreed with the plaintiff class (*id.* at A47-A51) that, in implementing the lump sum rule, petitioner had failed to provide the notice required by 45 C.F.R. 206.10(a)(2)(i).³ The court found that petitioner "does not

³ 45 C.F.R. 206.10(a)(2)(i) states that: "Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program, and related services available, and the rights

advise AFDC applicants of the lump sum rule at the time they apply for benefits," that the "only information provided by [petitioner] to Minnesota AFDC recipients regarding the lump sum policy [was the] * * * September 18, 1981 [letter]," that this letter "fell short of the requirement [of 45 C.F.R. 206.10 (a)(2)(i)] that applicants are to be advised of 'conditions of eligibility,'" that "[n]o class member who applied for AFDC after September 18, 1981 has received *any* written notice of the lump sum policy," and that "recipients are sometimes not advised of the lump sum rule until [petitioner] sends them a termination of benefits notice" (Pet. App. A48). The court found that the "lack of advance notice makes it essentially impossible for the majority of AFDC recipients to budget their lump sums according to the rigid formula imposed by [petitioner]" (*ibid.*).

As a remedy, the court ordered petitioner to prepare a "thorough explanation of the mechanics of the [lump sum] rule[,] to mail that explanation to "all current AFDC recipients," and to "include such an explanation [both] in the information which it provides to all individuals who apply for AFDC benefits" and "in the material that is given to recipients at the time of their periodic six-month reevaluation for benefits" (Pet. App. A57). In addition, the court ordered petitioner to notify those recipients who had had their benefits terminated (because of the lump sum rule) that the terminations may have been improper and that, under state law, they could reapply for benefits

and responsibilities of applicants for and recipients of assistance. Specifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity."

(*ibid.*). But it refused to enjoin petitioner from seeking to recover, by way of a reduction in future payments, AFDC benefits that were paid to respondent during the pendency of her challenge to the lump sum rule,⁴ finding that the Eleventh Amendment barred such relief (*id.* at A89-A90).

3. On appeal by both petitioner and respondent,⁵ a divided panel of the court of appeals affirmed in part and reversed in part (Pet. App. A1-A25). The court agreed with the district court (*id.* at A8-A16) that petitioner had failed to comply with the requirements of 45 C.F.R. 206.10(a)(2)(i). But it disagreed with the district court's refusal to enjoin petitioner from seeking to recoup the overpayments made to respondent (Pet. App. A18-A22).

a. On the notice issue, the court of appeals first rejected petitioner's argument that the requirements of 45 C.F.R. 206.10(a)(2)(i) are satisfied by "informing an AFDC recipient of the lump-sum rule and its operation when the recipient reports receiving or

⁴ Respondent had been found eligible for AFDC benefits in November 1982 (Pet. App. A88). On October 31, 1983, however, her husband received a disability payment of more than \$5,000, which the family immediately spent (*ibid.*). Respondent reported the lump sum receipt to her caseworker, who informed her that the lump sum receipt rendered her family ineligible for AFDC benefits for six months (*ibid.*). While respondent pursued her administrative appeals, petitioner continued to pay AFDC benefits to her (*ibid.*). After respondent's appeals were rejected, petitioner proposed to withhold one percent of her future monthly AFDC benefits until the overpayment was recovered (*id.* at A89).

⁵ The Secretary initially appealed the portion of the district court's order requiring him to pay the federal share of any benefits payable to the class, but subsequently withdrew that appeal (Pet. App. A7 & n.8).

appears likely to receive a lump sum" (Pet. App. A9). The court noted that "[t]he regulation on its face contemplates that in appropriate cases oral notice will be given as a supplement to written notice, not that it represents an alternative to written notice" (*ibid.*). Moreover, the court said, "[e]ven [if it were] true that oral notice may replace written notice in appropriate cases, * * * the oral notice provided by * * * [petitioner] cannot be considered 'appropriate' notice" (*id.* at A10). The court reasoned that, "[w]ithout advance notice, an AFDC beneficiary is unlikely to budget a lump sum according to the new rule's rigid formula" (*ibid.*) and that petitioner's "oral-notice policies do not reasonably assure that an AFDC recipient who gets a lump sum will have advance notice of the rule" (*id.* at A12). On the latter point, the court noted that "it is not always possible for the recipient or his or her caseworker to anticipate the receipt of a lump sum" and that "[e]ven a highly competent caseworker may wrongly determine that receipt of a lump sum is not likely, forget to provide[] notice of the rule, or be tardy in doing so" (*ibid.*).

The court then rejected petitioner's argument that the September 18, 1981 letter satisfied the requirements of 45 C.F.R. 206.10(a)(2)(i) (Pet. App. A14-A16). The court noted that "members of the plaintiff class who were not on the welfare rolls when this letter was sent out did not receive it or any other written notice of the lump-sum rule" (*id.* at A14); "[f]or these class members," the court ruled, "it is clear without further inquiry that the [petitioner] failed to fulfill his notice obligations under 45 C.F.R. 206.10(a)(2)(i)" (*id.* at A14-A15). Moreover, as to "those class members who were AFDC recipients

when the letter was mailed," the court found that "the letter was 'incomplete and confusing'" (*id.* at A15), reasoning that "the letter did not adequately explain the mechanics of the lump-sum rule and [its] inflexible operation" (*ibid.*), and that, "because the letter was ultimately inaccurate in reporting the rule's effectiveness date, it provided inadequate notice" (*id.* at A16).

Finally, the court rejected petitioner's argument that the district court could not enjoin the recoupment of overpayments made to respondent (Pet. App. A18-A22). The court held that "[a]n injunction against the [petitioner's] recoupment efforts would not run afoul of [the Eleventh Amendment's] strictures, because [petitioner had] already paid [respondent] the money at issue" and thus "[t]he remedy would not be a retroactive award of damages against the State" (*id.* at A19-A20). The court further held that federal regulations requiring the recovery of overpayments do not bar such an injunction, reasoning that "the payments to [respondent] cannot be considered an overpayment, because the [petitioner], having failed to provide adequate notice to [respondent] of the lump-sum rule, cannot properly invoke it against her"; "[b]y failing to comply with the notice regulation," the court ruled, "[petitioner] failed to institute a legal change in its eligibility rules" (*id.* at A21).

b. Judge Fagg dissented (Pet. App. A23-A25). He stressed that, under the express terms of the congressional enactment, "the 1981 amendment to the lump-sum rule became effective in Minnesota on February 1, 1982" (*id.* at A23) and that, "[c]onspicuously absent from the [enactment] was any suggestion that[,] in addition to this explicit effectiveness

date[,] Congress intended to include the implicit qualification that the implementation of the amendment hinged decisively on the state providing applicants and recipients alike with 'appropriate' advance written notice of the amendment's pending implementation" (*id.* at A24). Judge Fagg found 45 C.F.R. 206.10(a)(2)(i) to be a "regulation * * * of general applicability" that "was not adopted in direct response to the amendment" and that "does not mandate that implementation of congressionally adopted eligibility requirements be preceded by advance written notice" (Pet. App. A24). In his view, "the regulation simply requires the state to publicize generally in written form, and orally as appropriate, the AFDC program and its availability" (*ibid.*).

DISCUSSION

The decision below seriously misconstrues the regulatory scheme that the Secretary has established for informing AFDC applicants and recipients of the program's eligibility requirements. This Court should not allow that erroneous decision to stand.

1. Pursuant to the general rulemaking authority granted him by the Social Security Act (42 U.S.C. (Supp. III) 1302), the Secretary has established a tripartite scheme for disseminating information to applicants and recipients about the AFDC program. First, 45 C.F.R. 206.10(a)(2)(i) (emphasis added) provides that "[a]pplicants shall be informed about the eligibility requirements and their rights and obligations under the program"; under this regulation, state agencies must provide *applicants* with "bulletins and pamphlets" that describe the general eligibility conditions of the AFDC program and the individual's duty to report the occurrence of events that may

affect the amount of benefits to which he or she is entitled.⁶ Second, 45 C.F.R. 206.10(a)(2)(ii) (emphasis added) provides that "[p]rocedures shall be adopted which are designed to assure that *recipients* make timely and accurate reports of any change in circumstances which may affect their eligibility or the amount of assistance"; under this regulation, state agencies must make available procedures whereby individuals who are *receiving* AFDC benefits can report events that might affect their eligibility and seek counsel concerning the significance of those events. Finally, 45 C.F.R. 205.10(a)(4) provides that, "[i]n cases of intended action to discontinue, terminate, suspend or reduce assistance * * *, [t]he State or local agency shall give timely and adequate notice," including "a written * * * statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, [and an] explanation of the individual's right to request an evidentiary hearing * * *"; under this regulation, state agencies must

⁶ 45 C.F.R. 206.10(a)(2)(i) provides that "[u]nder this requirement[,] individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program, and related services available, and the rights and responsibilities of applicants for and recipients of assistance"; the state must ensure that "[s]pecifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity." 45 C.F.R. 206.10(a)(2)(iii) further provides that "[a]ll applicants for and recipients of assistance shall be notified in writing at the time of application and on redetermination that eligibility and income information will be regularly requested from agencies * * * and will be used to aid in determining their eligibility for assistance."

provide individualized notice and explanation to any person whose benefits are to be denied, reduced, or terminated. This tripartite scheme ensures that AFDC applicants and recipients receive the minimum amount of information deemed necessary (by the Secretary) for the fair and efficient operation of the AFDC program. See generally 43 Fed. Reg. 6949, 6950 (1978).

Petitioner appears, from her apparently uncontested description of her Department's procedures, to have fully complied with the requirements of the Secretary's tripartite information dissemination scheme. When an individual applies for AFDC benefits in Minnesota, petitioner provides the applicant with pamphlets and information packets that describe the individual's basic rights and obligations under the AFDC program (Pet. 6). Furthermore, while an individual is receiving AFDC benefits in Minnesota, petitioner assigns that individual to a caseworker (who can answer questions concerning events that may affect the recipient's benefit eligibility) and instructs the individual to report any change in circumstances to the caseworker (*ibid.*); indeed, petitioner periodically provides written materials (such as the September 18, 1981 letter) to AFDC recipients in Minnesota describing changes in the AFDC program and urging recipients to contact their caseworkers for additional information about those changes (*ibid.*). Finally, whenever an applicant is to be denied benefits or a recipient's benefits are to be reduced or terminated, petitioner sends the individual written notice describing the change and the reasons for it (*id.* at 10 n.2). The Secretary's information dissemination regulations require nothing more of petitioner.

2. The conclusion of the courts below—that petitioner violated 45 C.F.R. 206.10(a)(2)(i) by failing to supply AFDC applicants and recipients with advance written notice of the mechanics of the lump sum rule and its method of operation (Pet. App. A8-A16, A47-A51)—is plainly wrong. 45 C.F.R. 206.10(a)(2)(i) does not even apply to AFDC recipients; it requires only that “[a]pplicants shall be informed about the eligibility requirements and their rights and obligations under the program” (emphasis added). More importantly, 45 C.F.R. 206.10(a)(2)(i) does not require states to provide either applicants or recipients with advance written notice of the mechanics and operation of any AFDC program rule, including the lump sum rule. As Judge Fagg noted in dissent (Pet. App. A24), “[t]his regulation * * * is of general applicability[,] * * * was not adopted in direct response to the [lump sum] amendment, [and] does not mandate that implementation of congressionally adopted eligibility requirements be preceded by advance written notice.” Rather, “the regulation simply requires the state to publicize generally in written form, and orally as appropriate, the AFDC program and its availability” (*ibid.*).⁷

⁷ The court below suggested (Pet. App. A10 n.10) that, in answers to interrogatories in the district court, the Secretary had interpreted 45 C.F.R. 206.10(a)(2)(i) to require advance written notice to AFDC recipients of the lump sum rule's operation and effect. The court plainly misread the Secretary's answers, which we have reprinted in the appendix to this brief. The Secretary expressly stated that “[a] State has considerable latitude in the development of procedures it shall adopt to ensure effective administration of the AFDC program” and that “[p]rovisions at 45 CFR § 206.10(a)(2)(i) do not require a State to publicize the lump sum rule * * *” (App., *infra*, 6a (emphasis added)). Thus, while he advised

Contrary to the assertion of the courts below (Pet. App. A10-A11, A48-A51), interpreting the Secretary's regulation in accordance with its plain terms does not undermine the ability of AFDC recipients to budget their monies in conformity with the lump sum rule. To begin with, like all other citizens, AFDC applicants and recipients are presumed to know the requirements of the law and their obligation to comply with it—certainly, there is no presumption to the contrary. See *Atkins v. Parker*, 472 U.S. 115, 127-131 (1985). In any event, here, when they apply for AFDC benefits, individuals are informed in writing that certain events (such as the receipt of additional money) can affect their eligibility for benefits and therefore that they should promptly report *any* change in circumstances to their respective caseworkers. The caseworkers can then inform the recipients whether and how the particular change in circumstance (such as the receipt of a lump sum) affects the recipients' benefit eligibility. AFDC recipients who follow these instructions are clearly capable of budgeting their monies in the manner intended by the lump sum rule; stated differently, the only AFDC recipients who will be unable to budget their monies in the manner intended by the lump sum rule will be those who ignore the instruc-

(*id.* at 4a (emphasis added)) that "45 CFR § 206.10(a)(2) (i) and (ii) require a State agency to inform AFDC applicants and recipients about eligibility requirements * * * [.] including "generally advising applicants and recipients of their obligation to report receipt of lump sum income, the operation of the lump sum rule, and [its] effect on eligibility for assistance," the Secretary also stated (*ibid.* (emphasis added)) that it is "not until a State takes action to terminate, discontinue, suspend or reduce assistance [that it is] * * * required to give timely and adequate written notice of the specific adverse action" and the reason for it.

tion that they promptly report *any* change in circumstance to their caseworker so that the caseworker can explain the effect of that change in circumstance to them.

To be sure, as the courts below noted (Pet. App. A10, A12-A13, A48-A51), some AFDC recipients may fail to inform themselves about the requirements of the law; others may fail timely to report the receipt of lump sums; and others may deal with caseworkers who fail accurately to inform them of the existence or effect of the lump sum rule. These are unfortunate cases and, where allowed by statute (see 42 U.S.C. (Supp. III) 602(a)(17)), a state may recalculate the ineligibility period for such persons. As a legal matter, however, these individuals are still presumed to know the requirements of the law and to be able to budget their receipts in conformity with those requirements. See *Atkins v. Parker*, 472 U.S. 115, 127-131 (1985) (welfare recipients are presumed to know the requirements of the law); *Heckler v. Community Health Services*, 467 U.S. 51, 63-66 (1984) (the government cannot be estopped by its agents' failure accurately to advise persons of a law's existence or effect); *Schweiker v. Hansen*, 450 U.S. 785, 789-790 (1981) (*per curiam*) (same). And, as a practical matter, the Secretary has determined that information is most effectively conveyed by face-to-face communications between program participants and caseworkers and that, except for general information requirements, the cost of advance written notices concerning the operation and effects of particular AFDC rules is too high to justify requiring all states to send them. This judgment—as to how information is best disseminated and as to what information his regulations re-

quire to be disseminated—is entitled to deference from the courts. See *Lukhard v. Reed*, slip op. 9, 12; *Lyng v. Payne*, No. 84-1948 (June 17, 1986), slip op. 12-13; *Blum v. Bacon*, 457 U.S. 132, 141-142, 145-146 (1982). The decision below errs in failing to accord that deference.⁸

3. The Secretary's judgment that his regulation should not be interpreted to require advance written notice of changes in AFDC program rules that affect eligibility (such as the lump sum rule) is an eminently reasonable one. The cost of complying with such a regulation would be very substantial: Congress and the Secretary are continuously adjusting the myriad requirements that affect eligibility in the AFDC program; the states would therefore be required to expend sizeable sums on printing and mailing letters concerning such changes to AFDC program recipients. Such diversions of the finite funds available for the program from benefit payments to administrative costs must be avoided where possible. Moreover, while the states may find it desirable and appropriate in special circumstances to provide such written notice (in addition to carrying

⁸ The court below erred in suggesting (Pet. App. A13-A14) that deference was inappropriate both because the Secretary had explained his regulations in the context of litigation and because that explanation "conflicts with the plain language of the rule, and would deprive the rule of much of its significance in this context." The Secretary's interpretation of his own regulation is entitled to deference, whether it is articulated in the course of litigation or not. See *Lukhard v. Reed*, slip op. 9, 12; *United States v. Morton*, 467 U.S. 822, 835-836 n.21 (1984). Moreover, as discussed in text, the Secretary's interpretation is consistent with the language of the regulation and gives equal significance to the regulation in the context of the lump sum rule as in any other context.

out the ordinary information dissemination requirements), the benefit to welfare recipients of doing so in all circumstances is questionable: even if large numbers of recipients would be affected by a particular change in program conditions, which is usually not the case, flooding recipients with notices about every program change will discourage them from reading any of the notices to determine whether any particular change affects them. Rather, recipients will be more likely to rely on their caseworkers to inform them of how their eligibility for benefits has been affected by any particular change in circumstance, which is exactly why the Secretary has not required states to expend their limited funds on expensive mailing programs. The contrary judgment of the court below is wasteful and, to the Secretary's mind, based on unrealistic assumptions about the benefits of such mailing programs.

4. The regulation in issue also applies to the Old-Age Assistance (42 U.S.C. (& Supp. III) 301 *et seq.*), Aid to the Blind (42 U.S.C. (& Supp. III) 1201 *et seq.*), Aid to the Permanently Disabled (42 U.S.C. (& Supp. III) 1351 *et seq.*), and Supplemental Security Income for the Aged, Blind, and Disabled (42 U.S.C. 1381 note) programs. Thus, the rationale of the decision below, if fully applied by that court or other courts, could cause widespread disruption of the administration of federal welfare programs. This Court's review is therefore warranted.⁹

⁹ Because the court of appeals' initial premise—that 45 C.F.R. 206.10(a)(2)(i) requires advance written notice to AFDC recipients of the mechanics and operation of the lump sum rule—is so plainly wrong, we do not address the questions (a) whether the September 18, 1981 letter constituted adequate advance written notice and (b) whether petitioner could

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary disposition.

Respectfully submitted.

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MAY 1987

nonetheless recover the overpayments made to respondent by way of a reduction in her future benefits.

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-83-579

SHARON SLAUGHTER, on behalf of herself and
her minor child TONI SLAUGHTER, PLAINTIFF

and

JENNIFER AYERS and HELEN STEWART,
INTERVENING PLAINTIFFS

vs.

LEONARD LEVINE, in his capacity as Commissioner
of the Minnesota Department of Public Welfare,
DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

MARGARET HECKLER, in her capacity as Secretary,
United States Department of Health and
Human Services, THIRD-PARTY DEFENDANT

THIRD-PARTY DEFENDANT'S RESPONSE
TO THIRD-PARTY PLAINTIFF'S
INTERROGATORIES (SET III) AND REQUEST
FOR PRODUCTION OF DOCUMENTS

Pursuant to Rules 33 and 34 of the Federal Rules
of Civil Procedure, Federal Defendant submits the
following response to Third-Party Plaintiff's Inter-
rogatories and Request for Production of Documents:

(1a)

2a

INTERROGATORY NO. 1:

State your name, title and business address.

Answer:

Jo Anne B. Ross, Associate Commissioner for Family Assistance, Social Security Administration, Office of Family Assistance, Transpoint Building, 2100 Second Street, S.W., Washington, D.C. 20201.

INTERROGATORY NO. 2:

Describe your duties, functions and responsibilities in HHS.

Answer:

In my capacity as Associate Commissioner for Family Assistance, I have overall responsibility for the administration of the Federal Aid to Families with Dependent Children (AFDC) Program under title IV of the Social Security Act.

INTERROGATORY NO. 3:

Identify all persons whom you have consulted or interviewed in preparation of the responses to these Interrogatories.

Answer:

- Michael H. de Maar—Director, Policy and Evaluation, Office of Family Assistance, Washington, D.C.
- The Department's Office of General Counsel, Social Security Division

3a

INTERROGATORY NO. 4:

State which of the persons whose names are contained in the answers to Interrogatory No. 3:

- a. Have made written or recorded statements to you concerning this case;
- b. Are the subject of memoranda by you regarding interviews or conversations concerning any issue in this case; and

In addition, identify each person in whose custody each such written or recorded statement and memorandum is presently located.

Answer:

- (a) Not applicable. None of the persons specified in Interrogatory No. 3 made written or recorded statements to me concerning this case, except to convey these interrogatories and pleadings.
- (b) Not applicable. None of the persons identified in Interrogatory No. 3 is the subject of any known memoranda by the Federal defendant or any other person acting on behalf of the United States Department of Health and Human Services.

INTERROGATORY NO. 5:

State whether HHS requires Minnesota to give immediate notice, either written or oral, to an AFDC assistance unit of the lump sum rule set forth in 45 CFR § 233.20(a)(3)(ii)(D) (recodified as 45 CFR § 233.20(a)(3)(ii)(F) effective October 1, 1984), including the length or manner of calculation of the

disqualification period and any exceptions to the rule, upon obtaining information that the assistance unit may or will receive lump sum income in the future but before the unit reports actual receipt of lump sum income.

Answer:

Federal regulations at 45 CFR § 206.10(a)(2)(i) and (ii) require a State agency to inform AFDC applicants and recipients about eligibility requirements and their rights and obligations under the AFDC Program. Under these requirements, States are fully expected to establish policies to ensure that individuals are provided information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program and related services available. This would include generally advising applicants and recipients of their obligation to report receipt of lump sum income, the operation of the lump sum rule, and the effect on eligibility for assistance. However, not until a State takes action to terminate, discontinue, suspend or reduce assistance is the State required to give timely and adequate written notice of the specific adverse action. See 45 CFR § 205.10(a)(4)(i) subparagraphs (A) and (B). In accordance with these provisions, "timely" means that the notice is mailed at least 10 days before the date of action, that is, the date upon which the action would become effective. "Adequate" means a written notice that includes a statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, explanation of the individual's right to request an evidentiary hearing (if provided) and a State agency hearing,

and the circumstances under which assistance is continued if a hearing is requested. Where a lump sum payment is the reason for adverse action, it is the responsibility of the State to advise the recipient consistent with the Federal requirements outlined above.

INTERROGATORY NO. 6:

If your answer to Interrogatory No. 5 is affirmative, state the legal basis for your position.

Answer:

The statutory authority for the regulatory provisions discussed in Interrogatory No. 5 is section 1102 of the Social Security Act.

INTERROGATORY NO. 7:

State whether HHS requires Minnesota to give immediate notice, written or oral, of the lump sum rule in addition to the written predetermination notice required by 45 CFR § 206.10(a)(7) to an assistance unit which reports receipt of lump sum income.

Answer:

Refer to the full discussion in the Answer to Interrogatory No. 5 which states the requirements that a State provide written or oral information as appropriate to individuals regarding the lump sum rule. Note that the requirements of 45 CFR § 206.10(a)(7) are cross-referenced to 45 CFR § 205.10 which are discussed at length in Interrogatory No. 5.

INTERROGATORY NO. 8:

If your answer to Interrogatory No. 7 is affirmative, state the legal basis for your position.

Answer:

The statutory authority for the regulatory provisions referenced in Interrogatory No. 7 is section 1102 of the Social Security Act.

INTERROGATORY NO. 9:

Is it the position of HHS that 45 CFR § 206.10 (a) (2) (i) requires Minnesota to publicize the lump sum rule, including the length or manner of calculation of the disqualification period and any exceptions to the rule, in specifically developed pamphlets or bulletins for general distribution to AFDC applicants and recipients?

Answer:

A State has considerable latitude in the development of procedures it shall adopt to ensure effective administration of the AFDC program. Provisions at 45 CFR § 206.10(a) (2) (i) do not require a State to publicize the lump sum rule or any other eligibility requirement in specifically developed pamphlets or bulletins. However, where a State elects this approach as one method to inform applicants and recipients about eligibility requirements, guidelines under the provisions at 45 CFR § 206.10(a) (2) (i) require that such pamphlets or bulletins explain the rules regarding eligibility in simple, understandable terms. They must also be publicized and made available for general distribution to the recipient population.

INTERROGATORY NO. 10:

Identify the person who helped to prepare your answers to these Interrogatories.

Answer:

- Michael H. de Maar
Director, Office of Policy and Evaluation
Office of Family Assistance, Washington, D.C.
- The Department's Office of the General Counsel, Social Security Division

Request:

All documents, not privileged, which interpret or address the scope or applicability of 45 CFR § 206.10 (a) (2) (i).

Response:

We have searched the official files of the Office of Family Family Assistance in Washington, D.C. and have located no documents which interpret or address the scope or applicability of 45 CFR § 206.10 (a) (2) (i).

I have reviewed the above Response to Third-Party Plaintiff's interrogatories and it is true to the best of my knowledge, information and belief.

/s/ Jo Anne B. Ross

JO ANNE B. ROSS

My commission expires on 8/14/88

/s/ Diana Dawson

Notary Public

Respectfully submitted,

JAMES M. ROSENBAUM
United States Attorney

8a

Date: Nov. 7, 1984

/s/ Mary L. Egan

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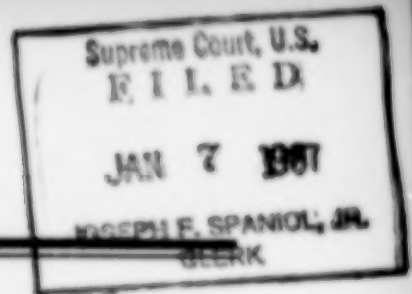
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AMICUS CURIAE

BRIEF

3
No. 86-978



IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

SANDRA GARDEBRING, Commissioner of the
Minnesota Department of Human Services,
Petitioner,
vs.

KATHRYN JENKINS,
Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

**BRIEF OF AMICI CURIAE THE STATES OF HAWAII,
LOUISIANA, ARKANSAS, MICHIGAN, SOUTH DAKOTA,
WISCONSIN, MISSOURI, WYOMING, NEW JERSEY,
CONNECTICUT, OHIO, GEORGIA, IDAHO, MARYLAND,
MAINE, IOWA, PENNSYLVANIA and TENNESSEE**

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TO THE HONORABLE WILLIAM H. REHNQUIST,
CHIEF JUSTICE, AND THE HONORABLE AS-
SOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

Amici present this, their brief in support of Sandra Gardebring's Petition for a Writ of Certiorari, for hearing before this Honorable Court.*

INTEREST OF THE AMICI

This case is one of dozens filed against states by welfare advocates across the country challenging various aspects of a provision of the Aid to Families with Dependent Children (AFDC) program known as the "lump-sum rule." Each of your *amici* participates in AFDC. Few of them have escaped litigation concerning the lump-sum rule, and none of them have escaped litigation concerning the AFDC program.¹

* The *amici* states file this *amici curiae* brief pursuant to Supreme Court Rule 36.4 which provides for filing such a brief without consent of the parties.

¹ In August of 1983, the Center on Social Welfare Policy and Law published *AFDC: The Lump-Sum Income Provision—How It Works and Suggestions for Advocacy*. By the end of 1983 there were nine reported decisions concerning the lump-sum rule. Since then, the total number of reported decisions from state and federal courts involving the lump-sum rule has grown to 46. In addition to the instant case, there are reported decisions from Michigan, New Mexico, and Indiana, all discussed below concerning advance notice, estoppel, and the lump-sum rule. These cases were apparently spawned by the Center's memo. "An equitable estoppel argument may be strengthened by reference to 45 C.F.R. §206.10(c)(2)(i) which requires the welfare department to inform applicants about their "rights and obligations" under the program. Center on Social Welfare Policy and Law, *AFDC: The Lump-Sum Income Provision—How It Works and Suggestions for Advocacy*, (1983), page 11.

AFDC, the nation's largest welfare program, is allegedly "based on a scheme of cooperative federalism." *King v. Smith*, 392 U.S. 309, 316 (1968). Under this concept, states who participate in AFDC are eligible for federal reimbursement in up to 50% of their AFDC expenditures. 42 U.S.C. §603. In return, each state must administer its AFDC program in conformance with applicable federal statutes and regulations. *Rosado v. Wyman*, 397 U.S. 387 (1970); *King v. Smith*, *supra*. Federal reimbursement is not available for any payments contrary to these statutes and regulations. In addition, such payments are deemed "erroneous excess payments." 42 U.S.C. §603. When these erroneous excess payments rise above a certain fixed percentage, "quality control sanctions" can be imposed and federal funding is reduced. AFDC quality control sanctions have been imposed against 21 states since 1985. Substantial non-compliance with federally-established eligibility standards can result in total withholding of federal financial participation. 42 U.S.C. §604.

For these reasons, Court orders requiring payment of AFDC benefits by states in contravention of the express provisions of the Social Security Act are a matter of some concern to your amici. The United States has taken the position in this and other litigation that it has discretion to decide whether it will provide federal reimbursement for court-ordered benefits. *Slaughter v. Levine*, 605 F. Supp. 1242 (D. Minn. 1985); *see also*, *Georgia v. Heckler*, 583 F. Supp. 1377 (N. Ga. 1984); *Kozera v. Spirito*, 723 F.2d 1003 (1st Cir. 1983). Furthermore, the United States takes the position "that its interests are not 'implicated' by the adequacy of the notice claims asserted by the

plaintiffs," 605 F. Supp. at 1250, and that it may decline to participate when court-ordered benefits are attributable to a state's administration of the AFDC program. *Chu Drua Cha v. Noot*, 696 F.2d 594 (8th Cir. 1982). Given the nature of "cooperative federalism" states are rightly concerned whenever a court inhibits a state's ability to enforce congressionally-mandated eligibility limitations.

That is precisely what has occurred in the instant case. The Eighth Circuit has required Minnesota to periodically send all AFDC applicants and recipients a two-page written description of 42 U.S.C. §602(a)(17), the lump-sum rule. Supposedly this notice is required by 45 C.F.R. §206.10(a)(2)(i), an administrative rule requiring states to publicize the AFDC program. Without this type of extensive and ongoing notice, Minnesota is barred from treating lump sums as required by federal statute.²

There are several aspects of the decision which strongly implicate state interests. First, this precedent provides welfare advocates a new means of blocking the implementation of federal statutory changes. In Minnesota, in Hawaii, and in other states,

² It should be noted that this case does *not* involve individual pre-termination notice. Welfare recipients have a due process right to receive pre-termination notice (and, if requested, appeal hearings) to guard eligible recipients against erroneous termination of benefits. *Goldberg v. Kelly*, 397 U.S. 254 (1970); 45 C.F.R. §205.10(a)(4)(i). Each person affected by the lump sum statute here received a detailed individual pre-termination notice before the state took any action to terminate benefits. The adequacy of those pre-termination notices has not been challenged.

the "Slaughter defense"³ is now raised in administrative hearings, state court actions, and federal litigation, to insulate welfare recipients against a wide variety of federal eligibility rules of which they claim to have received no notice. In addition, the decision establishes a precedent requiring states to periodically send lengthy written publicity of numerous federal eligibility requirements. Although the lump-sum statute may be distinguished from other eligibility requirements, the Eighth Circuit drew no such lines. Finally, the decision articulates no standards for judging the adequacy of this publicity, assuming it is required. What is or is not "adequate" will only be determined after the fact by an appellate judge.

These substantial interests warrant the submission of this brief in support of Minnesota's efforts to obtain review of the decision of the Eighth Circuit—a decision which threatens the fisc of each of your amici, invites havoc in the administration of their AFDC programs, and weakens public respect for welfare by allowing non-needy persons to receive benefits on the basis of "procedural errors."

SUMMARY OF ARGUMENT

Advance notice of particular eligibility rules is required by neither the due process clause nor federal regulations. The Eighth Circuit has misread federal program publicity rules to create a right to advance personal notice of a particular eligibility rule, before the rule can be applied to a recipient. By doing so, it has created administrative nightmares for states

³ So named for the original Plaintiff in this case, Sharon Slaughter.

who participate in AFDC, and has frustrated the will of Congress, by allowing recipients to escape statutory eligibility requirements of which they claim they had no advance notice. This new doctrine of "equitable estoppel" is contrary to the common law, and is in clear conflict with this court's prior decisions and the supremacy clause.

ARGUMENT

Advance personal notice of the lump-sum rule is required by neither the due process clause nor by federal regulations. In *Atkins v. Parker*, 472 U.S. 115 (1985), this court held that the due process clause did not require advance written notice to individual food-stamp recipients of the specific impact of statutory changes upon them. Welfare recipients have "no greater right to advance notice of legislative change . . . than any other voters." 472 U.S. at 125. The notion that the due process clause requires prior personal notice of the lump-sum rule has been expressly rejected when raised in other courts. In *Jackson v. Gussinger*, 589 F. Supp. 1288 (W.D. La. 1984), Judge Shaw wrote, in response to arguments identical to those made here:

The Fourteenth Amendment does not compel prior personal notice of statewide policy changes implemented pursuant to an agency's legislative rule-making function. *Accord, Cardinale v. Mathews*, 399 F. Supp. 1163, 1172 (D.C. 1975); *Provost v. Betit*, 326 F. Supp. 920 (D. Ver. 1971).

589 F. Supp. at 1294. *See also; Rivera v. Illinois Department of Public Aid*, 476 N.E.2d 1143 (Ill. App. 1985), holding the due process clause does not require

the welfare agency to notify a recipient of the consequences of receiving a lump-sum contemporaneously with his receipt thereof.

Although neither the district court nor the Eighth Circuit relied upon the due process clause as the source of any notice requirement, it is hard to imagine how the court could have found that the Secretary's regulation imposes a greater burden. The regulation does not expressly require detailed personal notice of any rule which might conceivably affect a recipient. 45 C.F.R. 206.10(a)(2)(i) merely requires that:

Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement, individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program, and related services available, and the rights and responsibilities of applicants for and recipients of assistance. Specifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity.

This provision is part of the first three subparagraphs of section 206.10(a). These subparagraphs apply, not only to AFDC, but also to Old Age Assistance, Aid to the Blind, Aid to Permanently and Totally Disabled, and Supplemental Security Income. They implement statutory requirements that all individuals wishing to apply be made aware of these programs,

be afforded an opportunity to apply, and be given a decision on their applications with reasonable promptness. For example, the AFDC statute, 42 U.S.C. §602(a)(10)(A), requires states to:

Provide that all individuals wishing to make application for aid to families with dependent children shall have the opportunity to do so, and that aid to families with dependent children shall, subject to paragraphs (25) and (26), be furnished with reasonable promptness to all eligible individuals. . . .

It is no accident that the first three subparagraphs of 45 C.F.R. 206.10(a) track this statutory language. Subparagraph (1) contains policies and procedures to guarantee that anyone who wishes to apply for benefits is permitted to do so. Subparagraph (3) announces policies and procedures requiring prompt decisions on applications. Sandwiched between these two subparagraphs is the notice regulation at issue here. Read in *pari materia*, and in light of the statutes which this rule implements, it is clear that subparagraph (2) is merely intended to facilitate general public knowledge of AFDC and other public assistance programs, so that individuals who might be eligible will be aware of them and the process by which they may apply.⁴ The fact that this regulation is primarily intended to publicize programs to the potentially eligible is further evident from the fact that it is ex-

⁴ Statutory provisions in other programs subject to this rule are virtually identical to the AFDC language. See: 42 U.S.C. §302(a)(8) [Old Age Assistance], 42 U.S.C. §1202(A)(11) [Aid to Blind], and 42 U.S.C. §1352(a)(10) [Aid to Permanently and Totally Disabled].

pressly directed towards "applicants." The Eighth Circuit has ignored the plain language and common sense meaning of the terms used in this rule to find that it applies to both applicants *and recipients*, and to judicially enact its own notions of what is sound administrative practice.

This misconstruction of the rule, coupled with the Eighth Circuit's references to the "drastic consequences" of the lump-sum statute, make it obvious that the court simply seized upon a convenient tool to obstruct the implementation of a congressional decision which it considered unwise. The Eighth Circuit has ignored this court's admonition in *Atkins, supra*, that "what judges may consider common sense, sound policy or good administration, however, is not the standard. . . ." 472 U.S. at 125 n. 29, and that courts "do not sit to pass on policy or the wisdom of the course Congress has set." *Heckler v. Turner*, 470 U.S. 184, 204 (1985).

The only other court which has expressly interpreted this regulation is the Michigan Court of Appeals. In *Zarko v. Director, Department of Social Services*, 325 N.W.2d 765 (Mich. App. 1985), the Michigan court squarely rejected the same rationale advanced by the Eighth Circuit saying:

Acceptance of claimant's argument would require the department to inform all applicants and recipients of all statutes and regulations which could conceivably affect their right to assistance before any question concerning their right to assistance could arise. Under claimant's interpretation of the rule, the department would carry out its duty by fur-

nishing applicants with a book of applicable statutes and regulations.

Such a procedure would scarcely be of more assistance to recipients than referring them to the nearest law library. The purpose of the regulation is best effectuated by providing practical assistance to recipients to deal with specific problems as they arise, not by giving recipients *pro forma* notice of every conceivable statute and regulation. We construe the regulation to require the department to initially inform applicants about general rules governing eligibility and client rights and obligations, to respond promptly to pertinent inquiries by applicants and recipients, and to promptly inform applicants and recipients of specific rules relevant to matters reported to the department.

375 N.W.2d at 768.

Your *amici* do not argue that the lump-sum rule should be kept a secret from welfare recipients; merely that a two-page notice sent every six months is excessive and unnecessary. It is true that publicity of the lump-sum rule effectuates its purpose—namely to encourage recipients to budget their lump-sums rather than exhaust them before the lump-sum disqualification period has expired. Notice, however, is no panacea. It is hard to imagine what sort of notice would have prevented the irrational behavior of Respondent Jenkins who, with her husband, disposed of over 90% of their \$5,752 lump-sum *the same day* it was received, without a passing thought as to how it might affect their AFDC eligibility.

States face many practical problems should the Eighth Circuit's decision be allowed to stand. Although the decision is limited to the AFDC lump-sum rule, the notice regulation upon which this decision is premised encompasses all of the eligibility criteria of five separate public assistance programs. As petitioner notes, federal AFDC eligibility regulations cover over 40 pages of the Code of Federal Regulations. States impose additional eligibility requirements. Although the Eighth Circuit seems to find that the lump-sum rule is unique because it is a departure from past practice and can result in prolonged ineligibility, neither of these factors are peculiar to this rule. AFDC is a complex and constantly changing program. Every rule can affect eligibility. Rules which could conceivably require the same notice as ordered here could include the step-parent deeming rule, the 185% income cap rule, the resource retention limits, the grandparent deeming rule, the automobile equity rule, the transfer of assets rule, the special rules affecting strikers, aliens, refugee sponsors, and several others whose mention only unduly lengthens this brief.

The burden which the Eighth Circuit places upon your *amici* is an onerous one. It forces welfare agencies to notify recipients in writing of specific eligibility rules before the recipients engage in conduct from which they might arguably have refrained had they known the effect of the rules. For example, an individual's decision to participate in a strike might hinge upon knowledge of the AFDC striker regulation. Of course, an agency cannot know in advance whether an individual is contemplating a certain course of conduct and cannot know what notice to give. The only safe course of action is to give detailed

notice of every conceivable regulation that might affect an individual's eligibility. This is impossible. Even providing every welfare family with the federal statutes and regulations would not suffice to meet this requirement. In fact, it would run afoul of the requirement that explanations be given in "simple understandable terms." This court has previously recognized that the Social Security Act "is among the most intricate ever drafted by Congress. Its Byzantine construction, as Judge Friendly has observed, makes the Act 'almost unintelligible to the uninitiated.'" *Schweiker v. Gray Panthers*, 453 U.S. 34, (1981).⁵

Of greatest concern is the Eighth Circuit's conclusion that "by failing to comply with the notice regulation, DPW failed to institute a legal change in its eligibility rules." What is at issue is more than Minnesota's "eligibility rules," it is an act of Congress. Congress has required states to disqualify lump-sum recipients for varying periods as provided in 42 U.S.C. §602(a)(17). When Congress enacted this statutory provision, it did not make its application contingent upon advance notice to those who might be affected. Even assuming that 45 C.F.R. 206.10(a)(2)(i) requires some sort of personal advance notice of changes in eligibility rules, invocation of this rule cannot be a basis for obstructing the clearly expressed will of Congress. To do so puts the cart before the horse, and elevates administrative rules above the statutes which

⁵ As the court also noted in *Schweiker*, Judge Friendly has described the medicaid statute as "an aggravated assault on the English language, resistant to attempts to understand it." *Freidman v. Berger*, 409 F. Supp. 1225, 1226 (S.D.N.Y. 1976); cited in *Schweiker*, *supra*, fn 14.

they supposedly serve. Whether or not Minnesota instituted a "legal change" in its rules is irrelevant. Congress makes the rules, and states simply do not have the option to operate their programs in violation of federal law. *King v. Smith*; *Rosado v. Wyman*, *supra*. Congressional enactments are more than just limitations upon the conditions under which federal funding will be provided. States who participate in AFDC have no option to operate their programs in violation of federal law. Any doubt on that subject was erased by this court many years ago in *Townsend v. Swank*, 404 U.S. 282 (1971). There, the majority rejected the dissenting view of Chief Justice Burger that the Social Security Act governs merely the dispensation of federal funds, and that state adherence to its provisions is not mandatory under the supremacy clause. If Congress had adopted a more liberal policy towards the treatment of lump sums, Minnesota certainly could not condition its implementation upon advance notice to recipients.

The lower court's conclusion that "having failed to provide adequate notice to *Jenkins* of the lump-sum rule, [Minnesota] cannot properly invoke it against her," is equally untenable. Clearly, it is not based upon the constitution, the AFDC statutes, or the AFDC regulations. It is a court-created doctrine of equitable estoppel which threatens to be a powerful weapon in the hands of welfare advocates to insulate their clients from the application of rules of which they purportedly have no advance knowledge. It is well established that the government may not be estopped merely because it has failed to fully publicize statutory requirements. *Lyng v. Payne*, — U.S. —, 106 S. Ct. 2333 (1986); *Heckler v. Community Health*

Services of Crawford County, 467 U.S. 51 (1984); *Schweiker v. Hansen*, 450 U.S. 785 (1981). Compare; *Watkins v. Blinzinger*, 610 F. Supp. 1443 (D. Ind. 1985) [recipients affirmatively misinformed that they could spend down lump sums and regain AFDC eligibility, but no relief granted due to Eleventh Amendment immunity], and also; *Muckey v. New Mexico Department of Human Services*, 694 P.2d 521 (N.M. App. 1985) [even if estoppel were available against the state, it would not apply where the recipient had not spent his lump sum in reliance on his case worker's failure to inform him of the consequences]. The spread of the "Slaughter defense" will seriously disrupt the ability of states to implement congressional changes to federal public assistance programs, and is a repudiation of the principles announced by this court that welfare recipients, like all other citizens, are "presumptively charged with knowledge of the law." *Atkins*, *supra*, at 125.

CONCLUSION

The decision of the Eighth Circuit portends manifold problems for the states in the administration of federally-assisted programs, and is in clear conflict with the principles of this court's prior decisions. For these reasons, your *amici* respectfully request that Minnesota's petition for a writ of certiorari be

granted, and that this court reverse the decision entered below.

January, 1987.

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JOINT APPENDIX

8
No. 86-978

Supreme Court, U.S.
FILED

AUG 31 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

SANDRA GARDEBRING, Commissioner of the
Minnesota Department of Human Services,
Petitioner,

vs.

KATHRYN JENKINS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 9, 1986
CERTIORARI GRANTED JUNE 15, 1987

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The following orders, opinions, and judgments have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Writ of Certiorari:

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CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

June 30, 1983—Complaint filed in U.S. District Court for District of Minnesota.

July 22, 1983—Original answer filed by state defendant.

Aug. 1, 1983—State defendant's third-party complaint against Secretary of Health and Human Services filed, 60-day summons issued.

Oct. 4, 1983—Answer of third-party defendant (Secretary of HHS) to third-party complaint.

Feb. 2, 1984—Complaint in intervention (by plaintiffs Jennifer Ayers and Helen Stewart) filed.

Feb. 21, 1984—State defendant's answer to complaint in intervention filed.

Aug. 29, 1984—Motions of plaintiffs for class certification and summary judgment filed.

Sept. 7, 1984—Motion of Kathryn Jenkins to intervene as plaintiff filed.

Sept. 7, 1984—Motion of third-party defendant (HHS) for summary judgment filed.

Sept. 19, 1984—Motion of state defendant for summary judgment filed.

Sept. 26, 1984—Second complaint (of plaintiff Kathryn Jenkins) in intervention filed.

Oct. 19, 1984—State defendant's answer to second complaint in intervention filed.

Dec. 11, 1984—Memorandum and order issued granting class certification and partial summary judgment for plaintiffs. Judgment entered.

Dec. 20, 1984—Motion by state defendant for reconsideration filed.

Apr. 2, 1985—Memorandum and order issued by district court ordering federal defendant to pay share of benefits,

denying state's motion for reconsideration and approving form of notice to recipients and applicants.

May 2, 1985—State defendant's notice of appeal from the district court's orders entered on December 11, 1984 and April 2, 1985 filed.

May 7, 1985—Motion of state defendant for stay pending appeal filed.

May 22, 1985—Federal defendant's notice of appeal from the district court's orders entered on December 11, 1984 and April 2, 1985 filed.

June 13, 1985—Memorandum and order issued by district court denying state defendant's motion for stay.

July 12, 1985—Federal appellant's motion to dismiss appeal granted by Eighth Circuit Court of Appeals.

Aug. 22, 1985—Notice and motion of plaintiffs for civil contempt, or in the alternative, for supplemental relief filed in district court.

Nov. 6, 1985—Memorandum and order issued by district court denying contempt motion and modifying publicity notice.

Dec. 5, 1985—Notice of appeal of plaintiff, Kathryn Jenkins, from the district court's memorandum and order entered November 6, 1985.

Sept. 10, 1986—Opinion and judgment of the Court of Appeals for the Eighth Circuit.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

File No. 4-83-579

SHARON SLAUGHTER,

Plaintiff,

v.

LEONARD LEVINE, in his capacity as Commissioner
of the Minnesota Department of Public Welfare,
Defendant and Third-Party Plaintiff

v.

MARGARET HECKLER, in her capacity as Secretary,
United States State Department of Health and
Human Services,
Third-Party Defendant.

THIRD-PARTY COMPLAINT

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief against Margaret Heckler, Secretary, United States Department of Health and Human Services (hereinafter "HHS") for failure to properly interpret § 402(a)(17) of the Social Security Act, as amended by Pub. L. 97-35, Title XXIII, § 2304, (Omnibus Budget Reconciliation Act of 1981 (OBRA)), 95 Stat. —, 42 U.S.C.A. § 602(a)(17) (Supp. 1982), and for issuing regulations inconsistent with the language of the Social Security Act. Plaintiff Slaughter's action subjects the third-party plaintiff to possible inconsistent obligations to this court and to the third-party defendants with the potential loss of federal funding for AFDC in Minnesota.

2. Leonard Levine, Commissioner, Minnesota Department of Public Welfare (hereinafter "DPW"), third-party plaintiff, is obligated to administer Aid to Families with Dependent Children (AFDC) in Minnesota in a manner consistent with federal law and regulation in order to obtain federal funding for the program.

3. Plaintiff Slaughter commenced her action against DPW with service of the Summons and Complaint on June 30, 1983. An answer was served on the plaintiff on July 21, 1983. Plaintiff alleged that DPW failed to offer her an opportunity to show that the lump sum was no longer available to her, and claimed that the policy violated the Social Security Act and its implementing regulations. Plaintiff seeks an injunction against DPW to prevent implementation of the lump sum provisions. Such a request, if granted, would put DPW at risk of losing federal funding for AFDC.

JURISDICTION AND VENUE

4. Jurisdiction over this action is based upon 28 U.S.C. §§ 1331, 1361 and 2201, and 5 U.S.C. §§ 701-706. There is an actual controversy between the parties. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e).

PARTIES

5. Third-party plaintiff Margaret Heckler is the Secretary of the United States Department of Health and Human Services (HHS) and in that capacity is charged with responsibility for administration and implementation of the Social Security Act, including AFDC.

6. Third-party plaintiff Leonard Levine is the Minnesota Commissioner of Public Welfare with responsibility for administration of AFDC in Minnesota.

THE AFDC PROGRAM

7. Aid to Families with Dependent Children (AFDC) is a program to provide assistance to certain needy children and

their caretakers, established as part of the Social Security Act, 42 U.S.C.A. §§ 601 *et seq.* (Supp. 1980). AFDC is operated in Minnesota by DPW in a manner consistent with federal laws and regulations, and is funded jointly by the federal, state and local governments.

8. The Commissioner of Public Welfare has the statutory authority to administer AFDC in Minnesota, and to promulgate rules as necessary to implement the program.

9. AFDC provides a monthly grant to families which meet certain eligibility criteria, including certain resource and income standards established by state and federal law. The amount of the grant is based on family size and the family's monthly net income.

10. DPW receives approximately \$10 million each month from HHS for AFDC.

11. On August 13, 1981, the United States Congress enacted OBRA. Title XXIII of OBRA made several major modifications to AFDC.

12. Section 2304 of OBRA, 42 U.S.C.A. § 602(a)(17), changes the manner of treatment of a lump sum received by an AFDC recipient and the effect on the recipient's eligibility caused by receipt of such lump sum. This provision became effective in Minnesota on February 1, 1982.

13. On September 21, 1981, HHS issued interim regulations governing the effect of receipt of a lump sum on AFDC eligibility. 45 C.F.R. § 233.20(a)(3)(ii)(D), 46 Fed. Reg. 46750, *et seq.* On February 5, 1982, HHS issued final regulations on the same subject. 47 Fed. Reg. 5648 *et seq.* HHS has interpreted 42 U.S.C.A. § 602(a)(17) to require that all lump sums shall be counted in determining eligibility for AFDC, even if the recipient of the lump sum cannot make the money received actually available to provide care for her children,

except in certain narrow circumstances not applicable to plaintiff Slaughter.

14. By letter dated May 23, 1983, Barbara Stromer, Director, Assistance Payments Division, DPW, requested clarification from HHS about treatment of a lump sum when the recipient had lost control of the money and could not make it actually available to provide care for the children. By letter dated June 22, 1983 Ms. Stromer was informed by Clyde Downing, Regional Administrator, Office of Family Assistance, HHS, that the loss of the funds could not be considered and that the family would remain ineligible as if the lump sum were still available.

SLAUGHTER'S COMPLAINT

15. Plaintiff Slaughter alleges that she received a \$5916 workers' compensation settlement on September 28, 1982, and that all but approximately \$600 was stolen from her on the following day. Plaintiff claims she reported the receipt of funds and theft to the Hennepin County Welfare Department. She alleges that she was told in October, 1982 that she would be terminated from AFDC effective November 1, 1982, and would remain ineligible for AFDC until January, 1984 because of receipt of the worker's compensation award.

16. Plaintiff Slaughter appealed the termination of her AFDC. A hearing was held before a state appeals referee. On July 19, 1983, Commissioner Levine upheld Ms. Slaughter's termination from AFDC because of the federal regulations, especially 45 CFR 233.20(a)(3)(ii)(D) (1982), interpreted by HHS to require the action taken by the county agency. On June 30, 1983, this action was commenced by the plaintiff against defendant/third-party plaintiff Levine for his application of the federal regulations.

17. Although plaintiff makes several claims with which DPW disagrees, DPW does agree with the plaintiff that Ms.

Slaughter's worker's compensation payment was not available to her once it was stolen and that federal regulations requiring termination of AFDC under such circumstances are inconsistent with the Social Security Act and therefore should be declared invalid.

18. DPW must administer AFDC in accordance with the federal regulations in order to ensure substantial federal funding for the program. Failure to do so will result in the loss of that funding.

19. HHS has taken the position in other litigation in which the Commissioner of Public Welfare has been a defendant that HHS will not honor court orders interpreting AFDC statutes and regulations unless HHS was a party to such action. Thus, if this court should find in favor of plaintiff Slaughter on any basis alleged by her, DPW would be bound to follow such order as to the plaintiff and any potential class members but could be barred from receipt of the federal funding for such payments.

20. HHS is an indispensable party to this litigation in that plaintiff's claims raise questions of federal law and regulation which are the obligation of HHS to interpret and administer.

21. If HHS is not made a party hereto and bound by each and every order of this court in this action, DPW risks the loss of federal funding for AFDC in Minnesota.

FIRST CAUSE OF ACTION

22. Third-party plaintiff repeats and realleges each and every allegation in paragraphs 1 through 21 of this Third-Party Complaint as if fully set forth herein.

23. By interpreting 45 C.F.R. § 233.20(a)(3)(ii)(D) without concern for whether the lump sum was and continues to be actually available to the recipient HHS has violated its duty to administer AFDC in a manner consistent with federal law.

SECOND CAUSE OF ACTION

24. Third-party plaintiff repeats and realleges each and every allegation in paragraphs 1 through 23 of this Third-Party Complaint as if fully set forth herein.

25. By failing to properly interpret federal law and requiring DPW to adopt this erroneous interpretation, HHS has forced DPW to misapply federal law or risk losing federal dollars. This risk would increase if DPW were subjected to an order of the court which did not also bind HHS. Failure to provide federal funding under such circumstances would violate DPW's right to receive such funding.

WHEREFORE, Third-party plaintiff Levine demands:

1. An order declaring that 42 U.S.C.A. § 602(a)(17) does not apply to lump sums or any portion thereof which are not actually available to the recipient.

2. An order declaring that 45 C.F.R. § 233.20(a)(3)(ii)(D) is inconsistent with federal law to the extent HHS claims it requires states to consider lump sums or portions thereof which are not actually available to the recipient.

3. An order enjoining HHS from withholding, terminating, suspending, reducing or otherwise limiting federal payments to DPW because of grants paid to recipients whose lump sums were not actually available to them.

4. An order granting DPW its costs and disbursements herein, including reasonable attorneys fees.

5. An order granting DPW such other relief as may be just and proper.

6. An order retaining jurisdiction of this action for such additional and supplemental relief as may be required.

Dated: August 1, 1983.

HUBERT H. HUMPHREY, III

Attorney General

State of Minnesota

By:

BEVERLY JONES HEYDINGER

Special Assistant

Attorney General

515 Transportation Building

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Telephone: (612) 296-2301

Attorneys for Defendant and

Third-Party Plaintiff

Leonard Levine,

Commissioner, Minnesota

Department of Public Welfare

ANSWER OF FEDERAL THIRD-PARTY
DEFENDANT TO THIRD-PARTY COMPLAINT

[Caption omitted in printing]

NOW COMES Margaret Heckler, Secretary of the United States Department of Health and Human Services, by and through her attorneys, JAMES M. ROSENBAUM, United States Attorney, and MARY L. EGAN, Assistant United States Attorney, and in answer to the specific paragraphs of the Third-Party Complaint respectively states as follows:

1. Paragraph 1 contains characterizations of the plaintiff's and the third-party plaintiff's actions and conclusions of law to which no response is required.

2. Admits.

3. The federal third-party defendant admits that the plaintiff commenced an action, but is without knowledge sufficient to form a belief as to the truth or falsity of the averments con-

tained in the first two sentences. With respect to the remainder of Paragraph 3, it consists of characterizations of the plaintiff's action and legal conclusions to which no response is required.

4. Denies.

5. Admits.

6. Admits.

7. The federal third-party defendant admits the allegations contained in the first sentence of Paragraph 7. With respect to the second sentence, the federal third-party defendant admits that the AFDC program is funded jointly and further states that she is without knowledge sufficient to form a belief as to the truth or falsity of the remaining averment of Paragraph 7.

8. Admits.

9. Paragraph 9 contains a characterization of AFDC eligibility and the federal third-party defendant refers the Court to the federal statute and regulations which contain all of the provisions governing eligibility for AFDC.

10. Admits.

11. Admits.

12. Admits.

13. The federal third-party defendant admits the allegations contained in the first two sentences of Paragraph 13. The third sentence is a characterization of HHS' interpretation of the statute and regulations and the Court is referred to them for their actual provisions.

14. The federal third-party defendant admits that the letters referred to in Paragraph 14 were exchanged and refers the Court to the documents themselves for their actual content.

15. The federal third-party defendant admits that plaintiff Slaughter in her Complaint made the allegations referred to in Paragraph 15 but states that she is without knowledge suf-

ficient to form a belief as to the truth or falsity of those allegations.

16. The federal third-party defendant is without knowledge sufficient to form a belief as to the truth or falsity of the averments contained in Paragraph 16.

17. Paragraph 17 is a characterization of the third-party plaintiff's legal conclusion to which no response is required, except that the federal third-party defendant denies the allegation that the federal regulations in question are inconsistent with the Social Security Act.

18. The federal third-party defendant admits the allegations contained in the first sentence of Paragraph 18. The second sentence is a legal conclusion to which no response is required.

19. Denies.

20. Paragraph 20 is a conclusion of law to which no response is required.

21. Paragraph 21 is a conclusion of law to which no response is required.

22. In answer to the repetition and reallegation of Paragraphs 1 through 21 of the Third-Party Complaint contained in Paragraph 22, the federal third-party defendant repeats and realleges her answers contained in Paragraphs 1 through 21 above.

23. Denies.

24. In answer to the repetition and reallegation of Paragraphs 1 through 23 of the Third-Party Complaint contained in Paragraph 24, the federal third-party defendant repeats and realleges her answers contained in Paragraphs 1 through 23 above.

25. Denies.

The federal third-party defendant hereby specifically denies all of the allegations of the Third-Party Complaint not hereinbefore otherwise answered.

AFFIRMATIVE DEFENSES

The Court lacks jurisdiction over this matter.

The Third-Party Complaint fails to state a claim upon which relief can be granted.

Pursuant to Rule 14 of the Federal Rules of Civil Procedure, the federal third-party defendant hereby asserts against the plaintiff Sharon Slaughter the affirmative defenses alleged in Paragraphs 34 through 39 of the Third-party plaintiff's Answer to the Complaint and herewith incorporates herein each and every such affirmative defense as if fully set forth herein.

WHEREFORE, having fully answered, the federal third-party defendant prays that this action be dismissed and that the Court grant such other and further relief as may be appropriate.

Dated: October 4, 1983.

Respectfully submitted,
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 United States Attorney
 By: **MARY L. EGAN**
 Assistant United States
 Attorney
 (612) 332-8961
 234 United States Courthouse
 110 South Fourth Street
 Minneapolis, MN 55401

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 Department of Health and
 Human Services
 300 So. Wacker Drive - 18th Floor
 Chicago, Illinois 60606

JAMES R. GOESER

Assistant Regional Attorney
 (312) 353-7743

**MOTIONS FOR CLASS CERTIFICATION AND
 SUMMARY JUDGMENT**

[Caption omitted in printing]

Plaintiffs, through their counsel, renew their motion for Class Certification pursuant to Rule 23 of the Federal Rules of Civil Procedure and move for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiffs seek an order certifying this action as a class action and a judgment declaring that defendant Levine's policy regarding the treatment of lump sum income in the AFDC program violates the Social Security Act and the U.S. Constitution. Plaintiffs also seek an order enjoining defendant Levine from enforcing the challenged policy throughout the State of Minnesota and requiring defendant to notify all members of the plaintiff class that they may be entitled to corrective payments under state law.

**LAW OFFICES OF THE
 LEGAL AID SOCIETY OF
 MINNEAPOLIS, INC.**
MARY G. GRAU
 Attorneys for Plaintiffs
 222 Grain Exchange Building
 323 Fourth Avenue South
 Minneapolis, Minnesota 55415
 (612) 332-1441

MOTION FOR SUMMARY JUDGMENT

[Caption omitted in printing]

Federal third-party defendant Margaret Heckler, Secretary of the United States Department of Health and Human Ser-

vices, by her undersigned counsel, pursuant to Rules 12(c) and 56 of the Federal Rules of Civil Procedure hereby moves the Court for summary judgment in her favor. As the accompanying Memorandum of Points and Authorities in Support of this Motion demonstrates, there is no genuine issue as to any material fact in this case, and based upon these facts, the entire record in this action and the controlling law, federal third-party defendant is entitled to judgment as a matter of law.

Dated: Sept. 7, 1984.

JAMES M. ROSENBAUM
United States Attorney
By: MARY L. EGAN
Assistant United States
Attorney
234 United States Courthouse
110 South Fourth Street
Minneapolis, MN 55401
(612) 332-8961

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

File No. 4-83-Civ. 579

SHARON SLAUGHTER, et al.,
Plaintiffs,
KATHRYN JENKINS,
Intervening Plaintiff,
v.

LEONARD LEVINE, in his capacity as Commissioner
of the Minnesota Department of Human Services,
Defendant and Third-party Plaintiff,
v.
MARGARET HECKLER, in her capacity as Secretary,
United States Department of Health and
Human Services,
Third-Party Defendant.

SECOND COMPLAINT IN INTERVENTION

I. PRELIMINARY STATEMENT

1. This is a civil action for declaratory and injunctive relief brought by individuals who receive Aid to Families with Dependent Children (AFDC) benefits in Minnesota. Sharon Slaughter brought the action in June of 1983. Intervening plaintiff is an individual who raises claims that are virtually identical to those at issue in the main action. Kathryn Jenkins challenges the policy of the State of Minnesota regarding the treatment of lump sum income in the AFDC program. Under this policy, lump sum, or non-recurring, income received by a member of an AFDC household is added together with any other income received in the month. The total is then divided by the AFDC standard of need for a family of the household's size. The figure that results represents a number of months during which the entire household will be considered ineligible for AFDC. This is called the "lump sum rule." Defendant's policy in this area violates the Social Security Act and the U.S. Constitution.

II. JURISDICTION

2. This Court has jurisdiction over the plaintiff's claims pursuant to 28 U.S.C. § 1343(3) and 28 U.S.C. § 1331.

III. INTERVENING PARTIES

3. Kathryn Jenkins is a resident of Hennepin County, where she lives with her husband and four children.

4. Leonard Levine is the Commissioner of the Minnesota Department of Human Services (formerly the Department of Public Welfare). In this capacity he has ultimate responsibility for administering the AFDC program in the State of Minnesota.

5. Margaret Heckler, the third party defendant, is the Secretary of the United States Department of Health and Human Services. She has ultimate responsibility for administering the AFDC program throughout the United States.

IV. CLASS ACTION

6. Plaintiff brings this action on behalf of herself and others similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure.

7. The class which plaintiff seeks to represent consists of those individuals in the State of Minnesota who are otherwise eligible for AFDC and who have been, or will be, found ineligible for AFDC benefits for a predetermined number of months as a consequence of receipt of lump sum income by one of the members of an AFDC assistance unit of which they have been a member.

8. The class of persons that plaintiff seeks to represent is so numerous that joinder would be impracticable.

9. There are questions of law and fact common to all members of the class.

10. The plaintiff will fairly and adequately represent the interests of the class members.

11. Defendant has acted on grounds that are generally applicable to the class, making declaratory and injunctive relief appropriate for the class as a whole.

V. FACTS

12. Kathryn Jenkins lives with her husband Raymond Jenkins and their four children at 2223 Aldrich Avenue North in Minneapolis.

13. In 1979 Raymond Jenkins was injured in a job-related accident. He has been unable to work since the accident. Kathryn Jenkins is also unemployed.

14. In November of 1982, the Jenkins family applied, and was found eligible for, benefits under the AFDC Incapacitated Parent program through Hennepin County.

15. At the time of their 1982 AFDC application the Jenkins informed the County that Raymond Jenkins had filed claims for worker's compensation and Social Security disability benefits. The family was not given any information about the lump sum rule at this time.

16. On October 31, 1984 Raymond Jenkins received a retroactive Social Security disability payment of \$5,752.00. On the day that he received the money, Mr. Jenkins wrote out a check for \$3,863.75 to Twin City Federal Savings & Loan Association to satisfy the arrearage on his home mortgage. The property was about to go into foreclosure.

17. On the same day Mr. Jenkins paid \$1,366 on an overdue car repair bill. The remainder of the disability payment funds were used to pay other bills and to purchase winter clothes, coats and boots for the Jenkins children.

18. On November 2, 1983 Kathryn Jenkins called her welfare worker to report receipt of the disability settlement. During this phone conversation the lump sum rule was explained to her for the first time. She was told that under state policy she and her family were expected to live on the disability funds for an absolute, predetermined period of time.

19. When Kathryn Jenkins called Hennepin County on November 2, 1983 none of the lump sum funds were available for her family's support.

20. On November 3, 1983 Hennepin County issued a written notice informing the Jenkins family that their October and November AFDC grants would be considered an overpayment, that their ongoing benefits would be terminated as of December 1, 1983, and that they could not attempt to re-establish eligibility for AFDC until May 1984.

Kathryn Jenkins filed a timely appeal of the proposed termination. Pursuant to state and federal law the family's AFDC benefits continued while the appeal was pending.

22. An administrative appeal hearing took place on December 22, 1983 before state Appeals Referee Everett Hedman. Referee Hedman recommended that the agency's action be reversed, but in a decision dated August 9, 1984 Deputy Commissioner Francis Giberson refused to accept the Referee's recommendation and affirmed the termination. A copy of the Decision of State Agency on Appeal of Kathryn and Raymond Jenkins is attached hereto as Exhibit A.

23. As a consequence of the Commissioner's order, the Jenkins family has been charged with an AFDC overpayment of \$5,464.00. Hennepin County will collect the overpayment by reducing the family's monthly AFDC grant. The Jenkins' sole source of support is AFDC. A copy of the 9/5/84 Overpayment Letter is attached hereto as Exhibit B.

24. It is the policy of the Minnesota Department of Human Services to treat non-recurring, or "lump sum," income received by AFDC recipients in the following manner; the amount of the lump sum is added together with any other income received in the month, and the total is then divided by the AFDC standard of need for a family of the assistance unit's size. The figure that results represents a number of

months during which everyone who was a member of the assistance unit at the time of receipt of the lump sum will be considered ineligible for AFDC benefits. Any remainder is applied to reduce the amount of the AFDC grant in the first month of resumed eligibility. See Department of Public Welfare Instructional Bulletin No. 82-3 Attachment 13, a copy of which is attached to the original complaint as Exhibit 2.

25. Prior to February 1, 1982, it was the policy of the Minnesota Department of Human Services to treat lump sums received by AFDC recipients as income in the month of receipt and as a resource, to the extent retained, thereafter. See MR 9500.0110 Subp. 17.

26. Individuals who were AFDC recipients in Minnesota when the new lump sum policy was instituted either received no notice or inadequate notice of the change. Individuals who have applied for AFDC in Minnesota since October 1, 1981 do not receive any written material containing information about current lump sum policy at the time of their application for benefits.

27. Current Minnesota Department of Human Services policy regarding the treatment of lump sums does not afford recipients any opportunity to demonstrate that the lump sum is no longer available before ineligibility will result; the policy applies regardless of whether or not there have been changes in circumstances that make it impossible for the recipient to rely on the lump sum funds for support.

28. It is the current policy of the Minnesota Department of Human Services to treat lump sums received by individuals who are not recipients of AFDC as income in the month received and as a resource, to the extent retained, thereafter.

VI. CLAIMS FOR RELIEF

29. The policy of the Minnesota Department of Human Services of declaring AFDC recipients who reside in an as-

sistance unit in which one of the members has received a lump sum to be ineligible for assistance for the full number of months which results when the amount of the lump sum is divided by the AFDC standard of need for a family of the assistance unit's size, regardless of changes in circumstances that make it impossible for the members of the assistance unit to use the lump sum funds for their support, violates rights secured to plaintiff by 42 U.S.C. § 602(a)(7), its implementing regulations, and by the Supremacy Clause of the United States Constitution.

30. The policy of the Minnesota Department of Human Services of failing to provide AFDC applicants and recipients with adequate advance notice concerning the lump sum rule violates rights secured to plaintiff by federal regulation at 45 C.F.R. § 206.10(a)(2)(i), and by the Supremacy Clause of the United States Constitution.

31. The policy of the Minnesota Department of Human Services of declaring AFDC recipients who reside in a household in which one of the recipients has received a lump sum to be ineligible for assistance for the number of months that results when the amount of the lump sum is divided by the AFDC standard of need for a household of the assistance unit's size violates the due process clause of the Fourteenth Amendment to the U.S. Constitution in that:

1. The challenged policy creates a conclusive presumption that lump sum funds are actually available for the entire period of ineligibility without offering recipients any opportunity to rebut the presumption of availability;
2. the challenged policy was implemented and is currently applied without affording AFDC recipients adequate advance notice of the new procedures; and
3. the challenged policy arbitrarily punishes innocent AFDC recipients for the wrongdoing of others.

32. The policy of the Minnesota Department of Human Services of declaring AFDC recipients who reside in a household in which one of the recipients has received a lump sum to be ineligible for assistance for the number of months that results when the amount of the lump sum is divided by the AFDC standard of need for a household of the assistance unit's size violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution in that it affords disparate treatment to two similarly situated groups of individuals without any rational basis, to wit: lump sums received by AFDC recipient households result in ineligibility for an absolute, predetermined period of time, while lump sums received by non-recipients are treated as income in the month of receipt and as a resource thereafter, allowing them to establish eligibility for AFDC as soon as the funds are no longer available. Both recipients and non-recipients for whom lump sum funds are no longer available are similarly situated in that they require the financial support of the AFDC program.

33. Plaintiff has stated a cause of action pursuant to 42 U.S.C. § 1983, and is therefore entitled to attorneys' fees pursuant to 42 U.S.C. § 1988.

WHEREFORE, plaintiff respectfully requests the Court to:

1. Certify this action as a class action.
2. Grant judgment to plaintiff declaring invalid the policy contained in Minnesota Department of Public Welfare Instructional Bulletin No. 82-3 Attachment 13 regarding the treatment given to lump sum income received by recipients of AFDC.
3. Issue a permanent injunction prohibiting defendant from enforcing the challenged policy.
4. Grant plaintiff her costs and disbursements in this action, together with reasonable attorneys' fees.

5. Grant plaintiff such other relief as is just and equitable.
Dated: September 7, 1984.

LAW OFFICES OF THE
LEGAL AID SOCIETY OF
MINNEAPOLIS, INC.
MARY G. GRAU
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MOTION FOR SUMMARY JUDGMENT

[Caption omitted in printing]

Defendant and Third-Party Plaintiff Leonard Levine, Commissioner of the State of Minnesota, Department of Human Services, by his undersigned counsel, pursuant to Rule 12(c) and 56 of the Federal Rules of Civil Procedure hereby moves the Court for summary judgment in his favor. As the accompanying Memorandum of Points and Authorities in Support of this Motion demonstrates, there is no genuine issue as to any material fact in this case, and based upon these facts, the entire record in this action and the controlling law, Commissioner Levine is entitled judgment as a matter of law.

Dated: September 14, 1984.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
By: VICKI SLEEPER
Special Assistant
Attorney General
515 Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-8403

STATE DEFENDANT'S ANSWER TO SECOND COMPLAINT IN INTERVENTION

[Caption omitted in printing]

Defendant Leonard W. Levine, for his answer to the Second Complaint in Intervention admits, denies, and alleges as follows:

1. As to paragraph 1, admits this is a civil action for declaratory and injunctive relief brought by individuals who receive Aid to Families with Dependent Children ("AFDC") benefits in Minnesota. Admits Sharon Slaughter brought the action in June of 1983. Admits that intervening plaintiff Jenkins is an individual seeking AFDC benefits and challenges the policy of Minnesota regarding the treatment of lump sum income in the AFDC program, but denies that her claims are virtually identical to those at issue in the main action. Denies intervening plaintiff's statement of that policy. Denies that defendant's policy violates the Social Security Act and the United States Constitution. Denies all other allegations contained in this paragraph.

2. Admits the allegations in paragraph 2 of the Second Complaint in Intervention.

3. Admits the allegations in paragraph 3.

4. Admits the allegations in paragraph 4.

5. Admits the allegations in paragraph 5.

6. In answer to paragraph 6, admits that plaintiff attempts to bring this action as a class action but alleges that plaintiff seeks to represent others who are not similarly situated to herself, and denies all other allegations contained in this paragraph.

7. Admits that plaintiff attempts to represent the class described in paragraph 8, but denies that plaintiff may represent such class. Asserts that plaintiff may only represent a

class of individuals similarly situated to herself, and denies all other allegations contained in this paragraph.

8. Admits the allegations in paragraph 8.

9. Admits that there are questions of law and fact in common to some members of the class, but denies that there are common questions to all members of the class plaintiff seeks to represent, and denies all other allegations contained in this paragraph.

10. Admits that plaintiff will fairly and adequately represent the interests of some members of the class, but that her interests are antagonistic or inconsistent to other members of the class she seeks to represent, and denies all other allegations contained in this paragraph.

11. Admits that the lump sum policy challenged by plaintiff is generally applicable to plaintiff and to those class members who are similarly situated, but denies that the challenged policy is generally applicable to all members of the class that plaintiff seeks to represent or that the declaratory and injunctive relief plaintiff seeks is appropriate for the class as a whole or in part, and denies all other allegations contained in this paragraph.

12. Admits the allegations in paragraph 12.

13. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13.

14. Admits the allegations of paragraph 14.

15. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15.

16. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16.

17. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17.

18. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18.

19. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19.

20. Admits the allegations of paragraph 20.

21. Admits the allegations of paragraph 21.

22. Admits the allegations of paragraph 22.

23. Admits that plaintiff's family has been charged with an overpayment of \$5,464.00, but alleges that he is without knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 23.

24. Denies the allegations in paragraph 24.

25. Admits the allegations in paragraph 25.

26. In answer to paragraph 26, alleges that individuals who were AFDC recipients in Minnesota during September 1981 received notice of the proposed federal changes in the treatment of the lump sum income. *See* Exhibit A, attached to answer to the original complaint. Denies that he or the Minnesota Department of Human Services had or has any affirmative duty to provide such notice. Alleges he is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 26.

27. Denies the allegations in paragraph 27.

28. Denies the allegations in paragraph 28.

29. Denies the allegations in paragraph 29.

30. Denies the allegations in paragraph 30.

31. Denies the allegations in paragraph 31.

32. Denies the allegations in paragraph 32.

33. Denies the allegations contained in paragraph 33.

34. Except as expressly admitted, denied, or otherwise qualified herein, denies each and every allegation, matter and fact contained in plaintiff's Second Complaint in Intervention.

AFFIRMATIVE DEFENSES

35. Alleges that the plaintiff's Second Complaint in Intervention fails to state a claim against defendant upon which relief can be granted.

36. Alleges that the plaintiff has failed to exhaust her administrative remedies.

37. Alleges that the class plaintiff seeks to represent is overly broad and individuals within the class have antagonistic or inconsistent interests.

38. Alleges that the Minnesota Department of Human Services has applied its lump sum income policy in a manner consistent with federal regulations, set forth at 45 C.F.R. §§ 233.20(a)(3) and 206.10(a)(2)(i).

39. Alleges that in administering the AFDC program, the Minnesota Department of Public Welfare is required to adhere to federal law. Failure by the Minnesota Department of Human Services to comply with the federal law in its administration of the AFDC program can result in sanctions against the State of Minnesota, including loss of federal financial participation in the program. 45 C.F.R. §§ 205.41 and 233.10 (a), (b).

WHEREFORE, Defendant Levine prays that this court:

1. Deny the plaintiff's request to certify this action as a class action.

2. Deny the plaintiff's request to declare invalid the policy contained in Minnesota Department of Public Welfare's Instructional Bulletin No. 82-3, Attachment 13, regarding the treatment given to lump sum income received by recipients of AFDC.

3. Deny the plaintiff's request for preliminary and permanent injunctive relief prohibiting defendant from enforcing the challenged policy.

4. Grant judgment to defendant Levine in all matters, and otherwise dismiss plaintiff's Second Complaint in Intervention.

5. Grant Defendant Levine his costs and disbursements in this action, together with reasonable attorneys' fees.

6. Grant Defendant Levine such other relief as is just and equitable.

Dated: 10/18/84.

HUBERT H. HUMPHREY, III

Attorney General

State of Minnesota

By: VICKI SLEEPER

Special Assistant

Attorney General

515 Transportation Building

St. Paul, Minnesota 55155

Telephone: (612) 296-8403

NOTICE OF MOTION AND MOTION FOR RECONSIDERATION

[Caption omitted in printing]

PLEASE TAKE NOTICE that Leonard Levine, Commissioner of the Minnesota Department of Public Welfare, brings the attached Motion for Reconsideration before the Honorable Harry H. MacLaughlin at the Federal Building, Courtroom 3, 110 South Fourth Street, Minneapolis, Minnesota. Defendant Levine does not request oral argument.

Defendant and Third-Party Plaintiff Leonard Levine, Commissioner of the State of Minnesota, Department of Human

Services, by his undersigned counsel, pursuant to Rules 59(a) and 60(b) of the Federal Rules of Civil Procedure hereby moves the Court to reconsider its December 10, 1984 Memorandum and Order. As the accompanying memorandum of points and authorities in support of this motion explains, Defendant Levine makes the following offer of proof:

(1) That Kathryn Jenkins, named plaintiff, received written notice of the lump sum rule prior to her receipt of the lump sum at issue in this case;

(2) That Kathryn Jenkins failed to report prior lump sums despite advance written notice of the lump sum rule.

Based on these facts learned in discovery subsequent to the parties' cross motions for summary judgment, Defendant Levine requests the Court to reconsider its finding that Jenkins has standing to raise a notice issue on behalf of the class and to vacate that part of its decision pertaining to notice. Defendant Levine also requests the Court to amend or clarify its Order regarding defendant Levine's notice obligations to the class and to order federal financial participation for benefits restored to class members.

Dated: 10/—/84.

HUBERT H. HUMPHREY, III

Attorney General

State of Minnesota

By: VICKI SLEEPER

Special Assistant

Attorney General

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Telephone: (612) 296-8403

Attorneys for Defendant Levine

A program for families AFDC



Department of Public Welfare
State of Minnesota

AFDC

Aid to Families with Dependent Children (AFDC) provides a monthly payment for the basic needs of children and their parents or qualified relatives. **AFDC-Emergency Assistance** is also available to provide financial help to resolve an emergency situation, such as a lack of heating fuel, food or shelter.

The information in this brochure will help you decide if you wish to apply for AFDC, but it is not intended to cover all program rules. You may wish to apply even if you think you may not be qualified. Until the county welfare office has all the facts about your situation, a final decision cannot be made about your eligibility.

How To Qualify

Your family may qualify for AFDC if you meet these requirements:

- You have one or more children under age 18 (or an 18-year-old under certain conditions) living with you or you are in the third trimester of your pregnancy.
- You or at least one of the child's parents:
 - is unemployed, or
 - has an illness or injury lasting 30 days or longer, or
 - is deceased or absent from the child's home.
- Your gross income does not exceed 150% of the state's AFDC standard.
- Your net income (after certain deductions) does not exceed state AFDC standards.
- Your family's non-exempt real and personal property does not exceed \$1000. Such property may include houses and land (part or all of your homestead is excluded), motor vehicles, insurance, stocks and bonds, expensive personal items, etc. And, of course, any cash or other "liquid resources" your family may have available is counted.
- You are willing to register with your state Job Service office or with the Work Incentive Program if you are able to work and are not exempted by the welfare office.
- You are willing to cooperate with the Child Support Enforcement program to get any support owed to you and to any child for whom you want AFDC, unless you have good cause for not cooperating; that is, if you believe that your cooperation would not be in the best interest of your child for one of several defined circumstances, and if you can provide sufficient evidence to support this claim.

If, as a child's relative, you need financial assistance for a child living with you for whom you are not the parent, you may either apply for AFDC for the child or

it may be to your advantage to become a "foster parent" for the child. Ask your welfare office to explain the foster care program and its advantages and requirements.

Even if you aren't eligible for AFDC to aid with your monthly living expenses, you may still qualify if you can show an emergency need. Such emergencies may include an eviction, a gas or electric shut-off, serious damage to your home, etc. Under **AFDC Emergency Assistance**, only the income and resources actually available to you are counted towards eligibility.

You are urged to contact your welfare office for specific information as to the eligibility rules and limitations for AFDC. Since these can and do change from time to time, you should inquire with your welfare office for up-to-date information.

How Much You Receive

The amount you receive in benefits depends upon your situation. For example, in July 1983 a family of one child and one adult with no other income would receive about \$412 per month; a family of two children and two adults would receive about \$570. Your first grant may be less depending on when you apply or when all eligibility factors are met. Your monthly income may be greater if someone in the family is working, because some of your earned income will not be deducted from your AFDC benefit for up to four months.

How To Apply

You can request aid by mail, by phone or in person. There are several steps which you must follow to apply:

- Ask the county welfare office for the AFDC application forms. (Refer to your county's listing in the phone directory.)
- Fill out the forms as accurately and completely as you can.
- Meet with the financial worker and explain your situation, and discuss any questions you have about the forms or about AFDC.
- Provide documents requested by the financial worker to verify the information you supplied on the forms.

It is important that you return your completed application to the welfare office as soon as possible. Your assistance will only be paid back to the *day on which you returned the application form* to the welfare office or the date you became eligible, if later.

The following documents are often needed to help verify your eligibility for AFDC:

- Driver's license or other means of identification.
- Social Security cards for all persons applying for AFDC.
- Birth certificates for the children.
- A copy of any child support court order or divorce decree.
- Check stubs and proof of other family income, such as copies of Social Security checks, pension checks, rent checks, union benefits, child support payments, and bookkeeping records if self-employed.
- Statements from financial institutions (banks, savings and loan associations; credit unions) if you or other family members have accounts.
- Stock, bond, or savings certificates, or trust fund papers.
- All insurance policies on yourself and members of your family.
- Proof of your residence, and information about any real estate you have, including a homestead (such as a rent receipt or landlord's statement, or if you're buying, your house tax statement and mortgage or contract-for-deed papers).
- A doctor's statement if you are ill, injured or not able to work.
- A copy of any prepaid burial agreement on any family member.
- A death certificate if the other parent of your child has died.
- Proof of the other parent's absence (if available and applicable to your situation).
- Farm records, including ownership records on any livestock you have.
- Title or registration card and loan papers for any car, truck, camper, snowmobile or other vehicles you own.

If you are not qualified for aid, the welfare office will notify you by letter within 45 days, unless more time is necessary to verify a medical disability. You may reapply at any time. If you are eligible for AFDC, you will get your first check within 45 days.

After you begin receiving AFDC, there are some circumstances in which you can receive additional assistance to help you meet certain special needs you might have. Some of these items include major home repairs, replacement or repair of essential household appliances and furnishings, or funds for special diets. Ask your financial worker.

If You Are Not Satisfied

If you do not agree with the decision of the welfare office, you can ask for an explanation and to be shown the policy manuals, rules or laws on which the decision was based. If you still are not satisfied, you may

ask to have your case heard by an appeals referee. Your welfare office will help you with the appeal procedure.

If you are still not satisfied, you have 30 days to appeal the State's decision to the District Court.

Other Programs

All persons in your family will also qualify for Medical Assistance during the time they receive AFDC. Medical Assistance pays the cost of medical, dental and related health services, including prescription drugs.

In addition, free preventive health care is available to persons in your family under 21. This program is called Early and Periodic Screening, Diagnosis and Treatment (EPSDT). Checkups, tests, immunizations and follow-up treatment are provided.

In many cases, food stamps are available free to persons receiving AFDC. You will have to fill out a separate application form if you wish to apply for food stamps.

Social services such as family planning, counseling, homemaking, child care and employability services are also available from your welfare office.

Your Right To Privacy

With very few exceptions, the information requested by the welfare office is legally classified as "private". This means that you are entitled to see the information about yourself, but it is not open to the public. It may, however, be shared with certain other government agencies. You have the right to challenge information in your file. For more information about this, ask your financial worker about the Minnesota Data Privacy Law or write the Minnesota Department of Public Welfare, Special Services Division.

Your Right To Fair Treatment

You have the right to fair, nondiscriminatory treatment. No welfare office may discriminate on the basis of color, race, national origin, religion, sex, age, marital status or because of physical, mental or emotional disability. You may file a complaint with the Minnesota Department of Public Welfare, Centennial Office Building, St. Paul, MN 55155; the Minnesota Department of Human Rights, Bremer Tower, 7th Place and Minnesota Street, St. Paul, MN 55101; or the U.S. Department of Health and Human Services, Washington, D.C. 20201.

aid to families with
dependent children

MONTHLY REPORTING

what afdc
households must know



department of human services
state of minnesota

MONTHLY REPORTING

To receive AFDC, you must report all of your household's income. This pamphlet tells you how to report your income using the Household Report Form.

RETROSPECTIVE BUDGETING

"Retrospective budgeting" is a way of looking at your past income to figure the amount of the AFDC grant you should receive each month. Except for the first two months, **your AFDC grant is figured "looking back" at your income two months earlier.** For example, your grant for December is based on the income you received in October. (However, for the first two months you receive AFDC, your grant is based on the best estimate of your income in those months).

This means that if you start working, your earned income will not reduce your grant for two months, so you will have a little "extra" money. But if you stop working, your income from that job will still be used to figure your grant two months later. For example, if you earn \$600 in March, but get laid off that month, and have no income in April or May, your May AFDC grant is still figured using the \$600 income you earned in March. Your June grant is figured using April's zero income.

If you are paid weekly or every other week (biweekly), there will be a few months in the year when you receive an "extra" paycheck — such as receiving five weekly paychecks in a month instead of four, or three biweekly paychecks instead of two. When that happens, your total month's income will be higher than usual. This may reduce or possibly end your AFDC grant two months later.

It is important that you be aware of when these changes in your grant will occur. You should plan for them, by saving "extra" money for when your grant is reduced. We cannot increase or add to your grant in the same month that your income drops.

WHO MUST REPORT

Every AFDC household must report income and other information using the Household Report Form. Most households must report every month. Some households need to report only every third month. Your worker will explain how often you must report. When you get a Household Report Form in the mail, fill it out. The top right corner of the first page of the form tells you what month or months to report about.

You must report your own income, and the income of a wife, husband and children who live with you. This must be done regardless of whether your grant is for just your children or for the whole family. If your grant includes your wife or husband, both of you must sign every Household Report Form you send in.

If you get both AFDC and Food Stamps, you don't need to send in a separate Household Report Form for Food Stamps. Information from your AFDC form will be used to figure both your Food Stamp allotment and AFDC grant.

FILLING OUT THE FORM

There are general instructions on the first page of the Household Report Form. Each question also has instructions on how to answer it. Please read all questions carefully.

You must answer every question. Pay special attention to reporting changes in your income or household situation which you expect to happen in the future. Examples are if you expect your work hours to increase or decrease, someone to move in or out of your home, or that a child will be born in a certain month.

YOU MUST SEND IN PROOF

Along with your completed Household Report Form, you must send in proof of your income and certain expenses. "Proofs" are pay stubs, employer's statements, baby-sitter receipts, etc. The instructions for each question will say if proofs are required. Proofs will be returned only if you make a note on the proof or the form that you want the proof returned.

TIMELY REPORTING IS IMPORTANT

Your Household Report Form will arrive in the mail with an unstamped return envelope. You will receive these near the end of the month about which you will report.

Sign and date the form on or after the last day of the month you are reporting about. If you sign and date it earlier than this, it will not include information about the whole month and **it will be returned to you.**

The local county agency must receive your complete form back by the **8th calendar day** of the month after the month you are reporting about. If the 8th of the month is on a weekend or holiday, the form is due the first working day after the 8th. It is **your** responsibility to mail it or hand deliver it to the county agency so it **arrives on time.**

MAILING THE FORM

When you finish filling out and signing the form, put the form and the proofs in the envelope so that the county address shows through the window of the envelope. **Remember to put proper postage on the envelope unless you will be delivering it by hand.**

IF YOU REPORT LATE

If the agency receives your complete report after the 8th of the month (after the due date printed on the form), it is considered "late" and your next AFDC payment may be delayed.

In addition, if you did not have good cause for reporting late, there will be a severe penalty — **you will not receive the work expense deductions or disregards** on any earnings you have. You will **not** be allowed the \$75 deduction, the deduction for child care expenses, or the \$30 and 1/3 disregard. In other words, your **gross income will be deducted dollar-for-dollar from your AFDC grant.**

This means that you may not be eligible for an AFDC grant for that month, if your gross income is higher than your AFDC payment level. For these reasons, it is very important for you to send in your report form **on time**, and to contact your financial worker when you have a problem with getting it in on time.

- If your report form is received **after the end of the month** in which it is due, your AFDC will be terminated. To receive AFDC again, you will have to reapply. You shouldn't let this happen because, in some instances, you may not be eligible when you reapply.
- If your case is closed and you reapply for AFDC, your first month's grant may not be a full month's amount. It will be reduced (prorated) to reflect the number of days left in the month from when you reapply or when you are again found eligible. In addition, you will have to meet all eligibility factors again.

GOOD CAUSE FOR REPORTING LATE

The penalty of not allowing the deductions and disregards on earnings will not be applied if you have "good cause" for reporting late. "Good cause" exists if:

- the local agency failed to accurately tell you which items were incomplete when they returned the form to you;
- your report form was postmarked prior to the deadline (prior to the 8th) but was received by the local agency two or more working days after it was postmarked;

BEST AVAILABLE COPY

- your employer delayed completion of your employment verification (for example, if you don't have pay stubs and you have to get your employer to complete the report form and they delay completing it);
- the local agency failed to provide assistance to you in completing the form;
- you did not receive a report form in the mail because of local agency error or because of a reported change of address;
- illness, physical or mental incapacity, or something else that you could not have avoided by exercising reasonable care which caused you to be unable to provide a completed form in a timely manner.

IF YOUR REPORT IS INCOMPLETE

- Your report will be considered incomplete if:
 - You sign or date it before the last day of the month.
 - You don't answer every question needed to determine your continuing eligibility.
 - You don't send in the required proofs.
 - You and your husband or wife (if living with you) do not sign the form.
- If your report is received on time (by the 8th) but it is **incomplete**, you will be given an additional 8 calendar days from the date it is remailed to you to complete and return your report form. (If you report your **earnings** by the 8th but your form is incomplete for another reason, the penalty for loss of deductions and disregards will **not** be applied.) The local agency will tell you what parts of the report form are not complete and must be completed, and will tell you the deadline for returning the form.

IF YOU HAVE QUESTIONS

Your county financial worker can answer your questions about filling out the Household Report Form or how your AFDC grant was figured. The county agency telephone number is on the first page of the Household Report Form.

NOTICE OF CHANGES IN YOUR GRANT

Your county agency will notify you when your AFDC grant will change. When we make a change based on information you provide on your Household Report Form, this notice will be mailed to you no later than the first day of the month in which you receive the changed grant. If you disagree with the change, you can file an appeal to have the change reviewed. You must make the appeal within 30 days of the notice sent to you by the county. If you appeal before the proposed action occurs or within 10 days of the mailing of the notice, your AFDC can continue unchanged until the appeal is decided.

To file an appeal, ask your county workers for the appeals forms, or contact the Appeals Office, Minnesota Department of Human Services, 444 Lafayette Road, St. Paul, MN 55101.

YOUR RIGHT TO FAIR TREATMENT

You have the right to fair, nondiscriminatory treatment. Neither the Minnesota Department of Human Services nor county agencies may discriminate against anyone because of their race, color, national origin, religion, sex, age, marital status, or because of physical, mental or emotional disability. If you feel you were discriminated against for any of these reasons, you may file a complaint with the Minnesota Department of Human Services, Centennial Office Building, St. Paul, MN 55155; the Minnesota Department of Human Rights, 500 Bremer Tower, 7th and Minnesota, St. Paul, MN 55101; or the U.S. Department of Health and Human Services, Washington, D.C. 20201.

DRAFT FOR DISCUSSION ONLY

[Department's Proposed June 1984 "Wrap-Around" Notice]

The enclosed form is an application for Aid to Families with Dependent Children (AFDC). You must answer every question. If you do not know the answer to a question or the answer is unknown, write "none" or "unknown" in the appropriate box. You may be required to verify certain parts of your application before it can be processed. You should keep this portion of the application as a reference. It contains important information about how eligibility is determined, your rights and responsibilities, and other benefits that you may be entitled to receive.

BASES OF ELIGIBILITY

The AFDC program is designed to meet the needs of families with one or more children who are deprived of parental support or care. There are two ways that families with both parents present can qualify:

Unemployed Parent—Assistance is available for families in which the parent who is the primary wage earner is employed less than 100 hours per month and has a qualifying work history.

Incapacitated Parent—Assistance is available for families in which one parent is physically or emotionally disabled.

There are two ways that a family with an absent parent can qualify:

Continued Absence—Assistance is available for families with a child or children who do not receive support or care from at least one parent. A qualifying relative may receive assistance if a child lives with them and does not receive support or care from either parent.

Stepparent—Assistance is available for a child or children who reside with a parent and a stepparent who are unable to support them.

A woman who is beginning her seventh month of pregnancy may also be eligible for assistance to cover her needs if she meets one of the first three qualifications described above.

RESOURCE LIMITS

The AFDC program has limits on resources. The types and amounts of resource limits are:

Liquid Resources—This includes cash and any other resource that can be readily converted to cash with a total limit of \$1000 per AFDC family. Savings accounts, stocks, bonds, life insurance policies that can be converted to cash, and burial accounts are types of liquid resources. Household items like jewelry, appliances and household furnishings are *not* included as liquid resources.

Automobile—The first \$1500 in equity that you have in a car is totally excluded. Equity can be figured by taking the amount that your car is worth and subtracting what you owe on it. Any equity that you have over \$1500 will be counted against the liquid resource limit. It is possible for you to have a car with up to \$2500 in equity if you do not have any liquid resources. The equity you have in any additional cars is also counted against the liquid resource limit.

Real Estate—The total value of the house that you live in and the lot it sits on is excluded. The equity of any other building or land that you own are counted against the liquid resource limit.

If you are a relative other than a parent and you are applying for a related child, the property of yourself, your spouse and children are not considered unless you wish to be included on the grant.

PAYMENT STANDARDS

The amount of assistance you receive is based on the number of children and adults in your family that are eligible to be on your AFDC grant. The payment standards as of July 1, 1984 are:

Number of Children in grant	plus	0 eligible adults	0 eligible adults (special standard)	1 eligible adult	2 eligible adults
1		\$246	\$331	\$431	\$504
2		339	431	524	597
3		426	524	611	684
4		500	611	685	758
5		576	685	761	834
6		651	761	836	909
7		715	836	900	973
8		779	900	964	1037
9		832	964	1017	1090
10		886	1017	1071	1144
Each additional child		+53	+53	+53	+53

The standard for a grant with only one adult is \$185. The special standards are used for grants that have only children on them because the caretaker is on SSI or sanction.

INCOME

Income is counted against the payment standard for your family to determine if it is eligible for AFDC and to determine the amount of your AFDC payment. Most forms of income are counted either as earned or unearned income, though certain payments like foster care, VISTA employment, all tax refunds except the Federal earned income credit, and certain tribal settlements are totally excluded.

Unearned income includes RSDI, Workers Compensation, Unemployment Compensation, and alimony. It is applied dollar for dollar against your AFDC payment standard. Earned income is budgeted by deducting up to three disregards that you may be eligible for. These include a \$75 work expense and up to \$160 per child in day care expenses that are to be deducted from your gross employment income. If you have been found eligible for AFDC, you may also be eligible to have an additional disregard deducted from this balance for four budget months. This disregard is called a "work incentive" and it is determined by subtracting \$30 from the balance plus 1/3rd of the remainder of your earned income. You may compute your own grant by following these steps. For example, if you and one child receive an AFDC grant and your gross income for a month is \$500, you would follow these steps:

\$500	gross earned income
- 75	work expense
-150	day care expense
<hr/>	
\$225	balance
- 30	first portion of the work incentive
<hr/>	

\$195	balance
	second portion of the work incentive
- 65	(1/3rd of balance)
<hr/>	

\$130 net earned income

The net earned income (\$130) is applied against the payment standard for your family (\$431) to determine the amount of your AFDC payment.

\$431	payment standard for one child and one adult
-130	net earned income
<hr/>	

There are a number of things that you should know about budgeting income for AFDC.

Prospective Budgeting—This is a way of looking at income in the month you receive it to determine if you are eligible for that month. It is also used to determine the grant that you receive for the first two months of AFDC eligibility. Anytime that you have an increase in income that will continue for at least two months, a prospective budget is done to determine if your family is still eligible.

Retrospective Budgeting—This is a way of looking at income when your family has been found eligible and the grant for the first two months has been issued using prospective budgeting. The grants for the following months are determined by counting your income for a month against the grant that you receive two months later. For example, if you are already receiving AFDC and you get a job, a prospective budget is done to see if you are still eligible. If you are eligible, your income is not counted until two months after you receive it. Income received in June is subtracted from your August AFDC grant. If the income ends, your grant cannot be changed until two months later. If you receive your last income in April, it will be counted against your June grant

and your July grant will be changed to reflect 0 income from May.

Gross Income Test—All family income is counted against an amount that is 150% of the payment standard for your family size to determine if your family is eligible for AFDC. If your AFDC grant includes yourself and two children, your payment standard is \$524. 150% of that amount is \$786. If your family's combined gross income is \$786 or greater, you will be ineligible for at least one month. This applies even though after subtracting all disregards you may have less than \$524 in net income.

Lump Sum—This would include any payments that you would not receive every month. These are non-recurring payments like a Workers Compensation Settlement, a Federal Earned Income Tax Credit received with your annual tax refund, an RSDI back payment, or an insurance settlement for an injury. These are budgeted prospectively in the month that you receive them and combined with other income for that month to determine if your family is still eligible for AFDC. If the total is less than the payment standard for your family, it will be budgeted retrospectively. If it is more than the payment standard, you will have an overpayment for the month that you receive it and any excess is applied against your need for future months. This may result in a period of ineligibility for you and your family. For example, if you receive AFDC for yourself and a child and you have no other income except a \$2,500 Workers Compensation settlement received in July, the settlement is divided by your payment standard to figure how long you will be ineligible. In this example, \$2,500 divided by \$432 to produce a period of five months that you will be ineligible. The remaining \$340 is counted against the sixth month if you reapply for AFDC then.

July's grant of \$432 is an overpayment. If you receive August's grant, that is also an overpayment. Your family would also be ineligible for September, October and November and would be eligible for a reduced grant for December. It is to your advantage to report a lump sum before you receive it. If you knew in June that you were to receive a \$2,500 lump sum in July and reported it, your July grant could be cancelled. If you receive a lump sum when you are cancelled from AFDC, it cannot affect future eligibility. You could reapply on August 1 and still be found eligible if you had reduced the lump sum below the resource limits.

\$10 Minimum Payment—If your combined income is deducted from your grant and you are eligible for a payment that is less than \$10, you will not receive a payment. You will be eligible to continue to receive other program benefits.

Proration—AFDC eligibility begins with the day that you make application. Each day that passes in a month before you apply, reduces the amount of your payment. For example, if you make application on the 16th day of September (a 30 day month), your family will be eligible for one-half of a monthly grant. If you receive AFDC and eligibility lapses for a day or longer, you will receive prorated benefits.

YOUR RESPONSIBILITIES

Your responsibilities include:

1) Cooperation with the Work Incentive Program (WIN)
—Most counties require participation in WIN or registration with your local Job Service Office. You may be exempt if you:

- A) are under the age of 16,
- B) are a full-time student between the ages of 16 and 18,
- C) have a child under the age of six and you are not attending college as a full-time day student,

D) are incapacitated or injured or you have someone in your home who is incapacitated or injured and requires your care,

E) live too far away from a WIN office or

F) receive an Unemployed or Incapacitated Parent grant and one parent is already registered.

2) Cooperation with your county child support agency—As a condition for receiving AFDC, you assign any support benefits to which your child is entitled to county Human Service agency. You are required to provide information that will help the local agency locate the absent parent. Once your grant has been opened, you may be asked to provide information that will assist your child in establishing paternity, you will be required to turn any support payments that you receive directly to the local child support agency and you may be asked to participate in any court action brought in behalf of your child by the local child support agency. You must cooperate unless you qualify for a "good cause" exemption from seeking support. Receiving support can be an advantage because it may produce an income higher than your grant or because you may obtain rights to other benefits like Social Security, VA and other entitlements. Your local child support agency can also assist you if you are found or later become ineligible for AFDC.

3) Reporting Changes—You are responsible to inform the county agency of any changes which may affect your assistance, such as: starting or changing employment; change in the number of persons in the household; marriage, divorce or separation; return of absent parent; change in visitation or absent parent's known address; starting to receive or change in income or support payments from any source (Social Security or Veterans benefits, lump sum payments, tax refunds, inheritances, court settlements, etc.); address change, personal property change; buying or selling a house. These changes must be reported within 10 days, by the 5th of the following month, or as soon as you expect them to occur, whichever is

earliest. If you knowingly provide false information, you will be subject to prosecution for fraud. Any of the information you provide may be verified by the county agency.

4) Cooperation with Quality Control—Your case may be randomly selected in the state agency's quality control sample for a review. This means there will be a review of your statements on these forms and a review of whether or not the county agency correctly determined your eligibility for assistance. Information may be sought from other sources other than you under the following conditions:

A) You will be given the opportunity to provide the information yourself, thereby eliminating the need for the agency to make contact with other sources.

B) You will be informed of the contacts that the agency makes.

C) Normally your permission will be obtained for these contacts.

D) Even if you object to the contacts or fail to provide information, the state agency may make the contacts after notifying you.

YOUR RIGHTS

Your rights include:

1) Privacy—As an applicant and recipient of AFDC, you are protected by the Minnesota Data Privacy Act. The conditions of that act as they affect you are:

A) The information we request from you is needed to determine your eligibility for assistance and the amount, to enable us to collect federal or state funds for the assistance you receive, and to meet federal or state statistical requirements. You are not required to provide any information, but failure to do so may make you ineligible for AFDC.

B) Most of the information we request will be classified as "private" or "confidential", which means it will be used

only by county staff members who administer human service programs, staff members of the Minnesota Department of Human Services, the U.S. Department of Health and Human Services, and other agencies authorized access by law. When you are no longer a client of our agency, we will retain your file until federal, state and county requirements are met.

C) You or those you authorize, may see all "public" or "private" information about yourself by asking your financial worker. Although you cannot see "confidential" items, your financial worker can tell you if we have any. If you disagree with any information, you can have it reviewed and corrected, if in error. Ask your financial worker for a data privacy brochure for more information about your data privacy rights.

2) Application—You have the right to apply or reapply for AFDC at any time.

3) Knowledge of Eligibility Requirements—You have the right to know the eligibility requirements for AFDC and to receive an explanation of how your budget or eligibility is figured.

4) Explanation for Delay—You have the right to receive an explanation if your application for AFDC is not processed within 45 days.

5) Free Association—You have the right to choose where and with whom you wish to live and to choose your doctor, hospital, etc., within certain limitations.

6) Appeal—If you are dissatisfied with the county human service agency's action, or if you feel our agency has failed to act upon your request for AFDC, you may appeal within 30 days through the county human service agency or directly to the Appeals Office, Department of Human Services—address below. (If you show good cause for not appealing within the 30-day limit, the state human service agency can accept

your appeal for up to 90 days following the date you receive notice.) In some circumstances, your assistance can continue until the hearing if you file a written appeal before the date of the proposed action or within 10 days of the issuance of the notice. If you appeal you have the following rights:

A) You can have a lawyer, advocate, or other interested party present.

B) You have the right to see your file and to obtain copies of material that apply to your appeal.

C) You have a right to promptly receive a summary of issues.

D) You can bring written testimony and witnesses to the hearing.

E) If your county has an appeals office, you can appeal their decision to the state Appeals Office.

F) You can appeal the decision of the state Appeals Office to Minnesota District Court.

7) Protection Against Discrimination—If you feel you are discriminated against in any manner in the handling of your AFDC application or payment because of race, color, national origin, religion, sex, age, marital status, or because of physical, mental or emotional disability, you may file a complaint with the state or federal human service agency or with the State Department of Human Rights. See below for addresses.

State Agency

Department of Human Services
444 Lafayette Rd.—2nd Floor
St. Paul, Minnesota 55101

Federal Agency

U.S. Department of Health
and Human Services
Washington, D.C. 20201

State Department of Human Rights

500 Bremer Tower

7th Place and Minnesota Street

St. Paul, Minnesota 55101

OTHER AID PROGRAMS

If you are eligible for AFDC you probably also qualify for a number of other aid programs. These include:

1) **Medical Assistance (MA)**—AFDC recipients are automatically eligible for MA. You may receive nearly all medical services and prescriptions free. The Department of Human Services will send you a medical card every month which you can take to your doctor, hospital, druggist, dentist and eye care provider. They will send the bill directly to the Department of Human Services for payment. If you have private medical insurance, you must assign the benefits to the state so that they can collect payments from your insurance company. If you leave AFDC because of excess earnings you may be eligible for up to four months of additional MA benefits. You can receive MA even if you do not qualify to receive AFDC. Many counties also offer the option of participating in a Health Maintenance Organization as an alternative to MA. These are special contracts which do not require any co-payment on your part. Among the advantages to this option are:

A) It can help ensure your privacy. You and your family members will each receive a member card in the HMO they join rather than an MA card.

B) It may allow you to retain your current medical provider. Some HMO providers do not participate in MA.

C) Participation can assure 6 months of medical coverage. If your stay on AFDC will be short, you can enroll in an HMO and receive 6 months medical coverage from the point of your application for AFDC.

2) **Early and Periodic Screening, Diagnosis and Treatment (EPSDT)**—Every person between birth and 21 years of

age is eligible to participate. EPSDT is a preventive health program designed to check the physical, mental and emotional health for qualifying participants. Your local human service agency has a list of doctors and clinics that provide screenings.

3) **Food Stamps**—Most AFDC families are eligible for food stamps. Even if you are found ineligible for AFDC, you might still qualify to receive them. The amount you receive is based on income, family size and housing costs. They are intended to help you with your food budget so that you will be able to keep some of your income to pay for other needs.

4) **Social Services**—All AFDC families are eligible for social services. Even if you are ineligible for AFDC, you may still qualify for assistance. Family counseling, family planning and money management are some of the services available. Your local social service agency also funds other services such as day care, homemakers, and foster care placement.

5) **Emergency Assistance (EA)**—All families with children under 21 are eligible for this service to help in cases of severe hardship. Funds are available for threatened eviction, utility shutoff, lost or stolen AFDC funds, and problems resulting from a natural disaster. In general, you can only receive EA once in a 12-month period.

6) **Special Needs**—All AFDC recipients are eligible for this assistance. Your local human service agency receives a quarterly allotment to cover special needs. This includes replacement or repair of essential household appliances and furnishings, major home repairs and special diets.

OTHER FORMS OF ASSISTANCE

There are a number of other programs that you may be eligible for. Some are administered by your local human service agency and some are administered by separate agencies

and require that you make separate application in order to qualify. Some of these programs are:

1) **General Assistance (GA)**—This program is also administered by your local human service agency. It is designed to cover the needs of individuals and families who cannot qualify for any other assistance program. It primarily serves single adults. It also pays the costs of some individuals in board and care facilities, half-way houses and battered women facilities.

2) **Minnesota Supplemental Aid (MSA)**—This program is also administered by your local human service agency. This program is designed to cover the partial needs of adults who are blind, disabled or aged. Blind children are also eligible. You cannot receive AFDC and MSA at the same time.

3) **Retirement, Survivors, and Disability Insurance (RSDI)**—This program is administered by the Social Security Administration. You may be eligible if you are at least 62 years of age and retired, disabled, or you are the spouse of a qualifying wage-earner who is retired, disabled or deceased or are the minor dependent (child or step-child under the age of 18) of a qualifying wage earner. A disabled child of a qualifying wage-earner may also be eligible. You may receive RSDI benefits and still receive AFDC.

4) **Supplemental Security Income (SSI)**—This program is administered by the Social Security Administration. You may be eligible if you are blind, disabled or over the age of 65 and do not have enough income or resources to meet your needs. Blind and disabled children can also qualify. You or your family members cannot be required to apply for this program as a condition of AFDC eligibility but it is an advantage to do so. Any income or property of an SSI recipient cannot be counted in determining AFDC eligibility and chil-

dren of an SSI caretaker qualify to receive AFDC at a higher payment level.

5) **Veteran's Assistance**—These programs are administered by the Veterans Administration. Veterans and dependents of veterans with service-related disabilities may be eligible for a VA disability pension. There are no income or property limits for eligible recipients. Veterans, who have a disability that is not service-related and have financial need, may qualify for a VA payment for themselves and their dependents. Other VA benefits include counseling, medical care, educational and housing assistance.

6) **Women and Infant Care (WIC)**—This program is separately administered and provides supplementary food needs for pregnant and nursing mothers and children under the age of 6 who have limited income. You may qualify even if you are not eligible for AFDC.

7) **Housing Assistance**—These programs are administered by the local housing authority. Every Minnesotan lives in a city or regional housing authority and your local human service agency can provide the address and phone number of your housing authority. Some forms of assistance include low cost rental housing. This is provided by housing owned directly by the local authority and by private rental housing which is subsidized by a payment from your local housing authority. Loans for the purchase and loans and grant for the rehabilitation of homes are also available for qualifying applicants with limited resources. They also are responsible for administering relocation funds.

8) **Energy Assistance**—A federally-funded energy assistance program is available if you have limited income and must pay your own heating or electrical bills. This is made available on an annual basis. It is administered by a wide variety of local volunteer or community action programs.

9) Weatherization Program—This is funded by the federal government and is contracted to private non-profit corporations. You may be eligible if you are a renter or home-owner on limited income. Assistance includes weatherstripping, caulking and insulation designed to reduce your energy bills.

10) Educational Assistance—The most basic form of funding for members of low income households who wish to pursue their education are Pell grants designed to cover basic and supplementary needs. These and other forms of grants and scholarships are available at the financial aid office of the college or vocational school that you wish to attend.

11) School lunch programs—Free or reduced school lunches are available to children in preschool, elementary and secondary school for children from low income households.

12) Food shelves—A variety of community organizations provide staple food products for individuals and families that have emergency food needs. These are usually available at times when your local human service agency is closed or is unable to immediately resolve your food needs.

13) Private assistance—There are a number of other food, clothing, shelter, counseling and other resources available through private organizations in your community. Your local United Way funds many of these organizations and they should be able to provide you with their names and the services they provide.

[Plaintiffs' Proposed Lump Sum Notice]

**IMPORTANT
INFORMATION ABOUT YOUR
ELIGIBILITY FOR AFDC
LUMP SUM INCOME**

This notice contains important information about your eligibility for AFDC after you have received LUMP SUM income.

Lump sum income is any cash payment that you do not receive every month, like workers compensation settlements, personal injury settlements, back payments of Social Security disability benefits, inheritances, and so forth. If you or anybody in your family gets a lump sum while on AFDC, the county will apply the LUMP SUM RULE to your case.

Under the lump sum rule you will be expected to save the money and live on it instead of receiving an AFDC grant for a period of months. This is called a PERIOD OF INELIGIBILITY. The County will use a formula to determine how long you will be expected to live on the lump sum money. The length of time that you will be ineligible for AFDC will vary depending on the size of the lump sum.

Here is how the lump sum rule works. Assume that you have one child and no other income besides AFDC of \$431 per month. If you get an inheritance of \$4,310 the agency will divide the amount of the lump sum—\$4,310—by the amount of your monthly grant—\$431—to produce a period of 10 months during which you and your entire family will be ineligible for AFDC. Your period of ineligibility begins in the month in which you get the lump sum, and in this example would last for 10 months *regardless of what happens to the money in the meantime*. You will *not* be allowed to go back on AFDC until the period of ineligibility is over even if you have used up some of the lump sum money on legitimate expenses like back bills.

There are a few exceptions to the lump sum rule. That is why it is very important that you get in touch with your AFDC financial worker as soon as you think you may be receiving a lump sum. Your financial worker will be able to give you a more detailed explanation of how the lump sum rule applies to your individual case. If you don't know in advance that you will be getting a lump sum, you should contact

your financial worker as soon as you receive the money. You should try not to spend any of the money until you talk to your financial worker.

If you receive lump sum income during a month when you are not on AFDC, then the lump sum rule does not apply. For example, if you stop receiving AFDC as of October 1st, and get a lump sum on October 6th, the lump sum rule isn't applicable. In that case you could reapply for AFDC benefits as soon as the money was gone.

REMEMBER, if you get a LUMP SUM while you are on AFDC, you'll be expected to live on the lump sum money until your PERIOD OF INELIGIBILITY has expired.

[District Court Judge's letterhead]

January 15, 1984

Ms. Mary Grau
Legal Aid Society of Minneapolis, Inc.
222 Grain Exchange Building
323 Fourth Avenue South
Minneapolis, MN 55415

Ms. Vicki Sleeper
Special Assistant Attorney General
515 Transportation Building
St. Paul, MN 55155

Ms. Mary L. Egan
Assistant U.S. Attorney
234 U.S. Courthouse
Minneapolis, MN 55401

Ms. Donna Morros Weinstein
Regional Attorney
Department of Health and Human Services
300 South Wacker Drive
Chicago, IL 60606

Re: Slaughter v. Levine v. Heckler
CIVIL 4-83-579

Dear Counsel:

Judge MacLaughlin has asked me to write you concerning the motion for reconsideration which has been filed in the above matter.

The Judge has read all of the briefs and has reached certain conclusions with regard to the motion. First of all, the Court continues to believe that plaintiff Kathryn Jenkins has standing to raise the notice question. The reasoning of the Court will be spelled out in a later order. The Court further believes that oral notice is insufficient and would be very difficult to prove or disprove.

With regard to the precise form which a written notice should take, the Court recognizes that there are advantages and disadvantages associated with both a separate notice relating to the lump sum rule and with a notice which is incorporated into a more comprehensive treatment of various aspects of the AFDC program. The Court is hopeful that the parties can, consistent with the Court's order, reach an agreement regarding the form of the notice. In any event, the notice should be succinct and should include some examples of the effect of the receipt of a lump sum.

If the parties are unable to work out such a notice within the next 30 days, the Court will place this matter back on the motion calendar for the purpose of hearing arguments from each side as to the form of the notice and for the purpose of giving direction to the parties as to the content of the notice.

However, as I stated above, it is Judge MacLaughlin's hope that the parties will be able to resolve the notice problem amongst themselves. Again, it is the Court's belief that the notice should be concise, to the point, and contain examples

which will make clear to recipients the effect of lump sum receipts.

Sincerely yours,
 ROBERT ZEGLOVITCH
 Law Clerk to
 Hon. Harry H. MacLaughlin

J/bj

P.S. Responses to the brief of third party defendant regarding federal financial participation should be submitted to the Court by Monday, January 28, 1985. Perhaps this matter also can be similarly resolved by the parties in the meantime.

[State Defendant's Attorney's letterhead]

February 14, 1985

HAND-DELIVERED

The Honorable Harry H. MacLaughlin
 United States District Court
 110 South Fourth Street
 Minneapolis, Minnesota 55401
 Re: Slaughter, et al. v. Levine v. Heckler
 Civil No. 4-83-579

Dear Judge MacLaughlin:

The State of Minnesota Department of Human Services (hereinafter the "Department") proposes to distribute the attached notice which informs all AFDC clients prospectively of their responsibility to report the receipt of income and explains in particular how the lump sum income rule works. Although we have discussed the notice format with plaintiffs' attorney, we are not in agreement. The notice incorporates the language of the notice proposed by plaintiffs' attorney almost verbatim.

The Department believes this notice provides clients with a more complete explanation of how the AFDC program treats receipt of income than the shorter notice proposed by plaintiffs' attorney and places the lump sum rule in context. Whereas the lump sum rule itself only affects approximately five percent of AFDC clients, all clients should be made aware of their general rights and responsibilities regarding income reporting. This notice encourages clients to inquire about the effect on their eligibility of any income they may receive and puts clients on notice of the consequences of failing to report income. Moreover, it explains to clients that they have the right to learn what their options are under the AFDC program at any time.

In the Department's view, one notice which addresses the treatment of income in AFDC is more helpful and cost-efficient than separate notices dealing piecemeal with various aspects of income reporting. The format of this notice clearly meets the Department's obligation to publicize the lump sum rule and is a reasonable exercise of administrative discretion. Because the parties have been unable to reach an agreement, the Department requests the Court to find that this notice complies with the Court's Order.

Sincerely,
 VICKI SLEEPER
 Special Assistant
 Attorney General
 Telephone: (612) 296-8403

VS/kf

Enclosure

cc: Mary G. Grau
 Mary L. Egan

IMPORTANT NOTICE ABOUT WHAT YOU SHOULD DO WHEN YOU HAVE INCOME, OR THINK YOU MIGHT RECEIVE INCOME IN THE FUTURE

This sheet explains what you, as an AFDC recipient, should do when you receive income. This applies to income from earnings and income from other sources or people, including gifts, inheritances, government programs like veteran's benefits or Social Security, and all other ways in which you might receive checks or cash.

It is *very important* that you read this sheet, both the front and the back. INFORMATION ABOUT LUMP SUM INCOME IS INCLUDED. It will give you some valuable help in knowing what you are supposed to do when you find out that you will be receiving a new kind of income that the welfare office doesn't know about yet. If you don't read it and then you find out what the rules are too late, you will risk:

- getting unnecessary reductions in your future AFDC grants because of overpayments that could have been avoided.
- losing a choice that you might have to have the income treated in a way that's better for you and your family.
- being penalized for not reporting, or for reporting late.
- being charged with fraud and, if convicted, suffering severe penalties.

TYPE OF INCOME

The two types of income are "earned" and "unearned" income.

"Earned" income is what you receive from working. When you have earned income, you are allowed to have some of it not deducted from your AFDC grant to cover work expenses and costs you have for day care, and, for a limited number of months, an extra amount to provide you with a work incentive bonus.

"Unearned" income generally means all other kinds of payments or money you receive that does not come from working. Some kinds of unearned income aren't counted by AFDC, but most are. Some kinds of unearned income can come regularly (like every month), or occasionally, or just once. Usually, it is hardest to remember to report unearned income, and hardest to know ahead of time how each kind of unearned income will be handled in AFDC.

HOW TO REPORT "EARNED" INCOME

Earned income is the easiest to report. You always list it on your Household Report form that we send to you, usually each month. If you get a new job, lose a job, or have a change in your hours or hourly pay rate, you should let your financial worker know that is happening by calling or visiting the welfare office. If you think it *might happen*, you can call your worker to find out how that would affect your grant.

HOW TO REPORT "UNEARNED" INCOME

There are some kinds of unearned income that you should tell your worker about *before* you receive it. For example, if you are getting a loan, your worker can tell you what will be needed by AFDC so that the loan will not get counted against your grant. Another important example is with "lump sum" income—a kind of income that is usually a fairly large amount and that you will not be receiving regularly. In the case of lump sums, you have some *very important* choices that you can make that will benefit you and your family, but these must be made *before* you actually receive the payment. READ THE LAST SECTION ON LUMP SUMS CAREFULLY FOR MORE INFORMATION.

Once you receive any unearned income, you must always report it on your Household Report Form. Anytime you want to know how a certain kind of unearned income will affect your AFDC grant, call or visit your financial worker.

YOUR RIGHT TO AN EXPLANATION OF THE AFDC PROGRAM'S RULES ABOUT INCOME

You have the right to know and understand the AFDC program's rules about income, whether you have already received the income or not. Your financial worker is required to tell you about policies in the program that could affect you, and what choices you have under the program that will be of benefit to you and your family or that will result in getting a higher grant. However, there are so many rules in AFDC that cover every possible situation that your financial worker can't possibly tell you all of them in advance. **IT IS YOUR RESPONSIBILITY TO KEEP YOUR FINANCIAL WORKER INFORMED ABOUT YOUR SITUATION**—especially any income you might expect to start receiving—**SO THAT YOUR FINANCIAL WORKER CAN TELL YOU WHAT YOU CAN DO TO GET THE MOST BENEFIT FROM THE AFDC PROGRAM.** The last section on this sheet gives an example of one situation in which it is *very important* for you to find out the program's rules *before* you actually receive your income. This is especially important because the AFDC rules do change a lot, and the old rules that you know about may now be different.

LUMP SUM INCOME

Lump sum income is any cash payment that you do not receive every month, like workers compensation settlements, personal injury settlements, back payments of Social Security disability benefits, inheritances, and so forth. If you or anybody in your family gets a lump sum while on AFDC, the county will apply the LUMP SUM RULE to your case.

Under the LUMP SUM RULE, you will be expected to save the money and live on it instead of receiving an AFDC grant for a period of months. This is called a **PERIOD OF INELIGIBILITY**. AFDC will use a formula to determine how long you

will be expected to live on the lump sum money. The length of time that you will be ineligible for AFDC will vary depending on the size of the lump sum.

Here is how the lump sum rule works. Assume that you have one child and no other income besides AFDC of \$431 per month. If you get an inheritance of \$4,310, AFDC will divide the amount of the lump sum—\$4,310—by the amount of your monthly grant—\$431—to produce a period of 10 months during which you and your entire family will be ineligible for AFDC. Your **PERIOD OF INELIGIBILITY** begins in the month in which you get the lump sum, and in this example would last for 10 months *regardless of what happens to the money in the meantime*. You will not be allowed to go back on AFDC until the period of ineligibility is over even if you have used up some of the lump sum money on expenses like back bills.

There are a few exceptions to the lump sum rule. That is why it is very important that you get in touch with your AFDC financial worker as soon as you think you may be receiving a lump sum. Your explanation of how the lump sum rule applies to your individual case. If you don't know in advance that you will be getting a lump sum, you should contact your financial worker as soon as you receive the money. You should not spend any of the money until you talk to your financial worker.

If you receive lump sum income during a month when you are not on AFDC, then the lump sum rule does not apply. For example, if you stop receiving AFDC as of October 1st, and get a lump sum on October 6th, the lump sum rule isn't applicable. In that case, you could reapply for AFDC benefits as soon as the money was gone.

REMEMBER—IF YOU HAVE ANY QUESTIONS, OR ARE NOT SURE ABOUT ANY OF THE RULES, CONTACT YOUR AFDC WORKER AND ASK.

[Plaintiffs' Attorney's letterhead]

March 1, 1985

Judge Harry H. MacLaughlin

United States District Court

110 South Fourth Street

Minneapolis, MN 55401

Re: Slaughter v. Levine, et al.

Civil No. 4-83-579

Dear Judge MacLaughlin:

I am writing to express plaintiff's reservations about the proposed notice to class members that defendant Levine has submitted to the Court in this case.

My primary concern about the proposed notice is that the information explaining the lump sum rule seems to get "lost" in the text. I have no objection to the defendant's interest in providing AFDC recipients with general information on their continuing obligation to report all types of income. However, the lump sum rule has much more drastic and irreversible consequences for recipients than any of the other AFDC eligibility requirements. It is also true that the notice relief order by the Court is necessary because the defendant has failed to provide adequate information about the lump sum rule to recipients in the past.

Under these circumstances, I don't think that it is unreasonable to require the defendant to issue a notice which deals exclusively with the lump sum rule. The general information about the distinction between earned and unearned income and the duty to report income promptly that comprises the first page of the proposed notice could be incorporated into an existing Department of Human Services' pamphlet dealing with the AFDC program's monthly income reporting system.

I have asked Rosemarie Park, a "plain language" specialist who teaches at the University of Minnesota, to review the proposed notice. Her affidavit is attached. As the affidavit indicates, Ms. Park is of the opinion that both the form and

content of the notice could be improved to make it easier for AFDC recipients to read and understand. Ms. Park suggests the use of a question and answer format. I would be happy to work with the Department of Human Services to redraft the notice using the format which Ms. Park describes.

As I have indicated, I would prefer that the notice deal solely with lump sums because of my concern that everything possible be done to reduce the probability that recipients will overlook the explanation of the lump sum rule. However, if the Court were to determine that the defendant should be permitted to include additional information in the notice I would still suggest that the notice be reviewed using the question and answer format.

Thank you for the opportunity to submit these remarks.

Sincerely,

LEGAL AID SOCIETY OF
MINNEAPOLIS, INC.

MARY G. GRAU

Attorney at Law

MGG: pkr

enclosure

cc: Vicki Sleeper

Mary Egan

AFFIDAVIT OF ROSEMARIE PARK

[Caption omitted in printing]

State of Minnesota

County of Hennepin—ss

Rosemarie Park, having been sworn on oath, deposes and says the following:

1. I have a doctorate in Education from Harvard Graduate School of Education with an emphasis in Reading. I currently teach adult literacy courses at the University of Minnesota. In conjunction with the Minnesota Attorney General's Office I helped develop the criteria for "plain language" now required

by the Minnesota Plain Language Contracts Act. I have also consulted for the Hennepin County Work Incentives Program on the readability of instructions to AFDC recipients regarding welfare payments.

2. I have been asked to review the notice that the Department of Human Services proposes to send the AFDC recipients in connection with *Slaughter v. Levine*. I understand that the purpose of the notice is to explain the consequences of the AFDC program's lump sum rule to recipients.

3. I have reviewed the proposed notice and have the following comments on it, keeping in mind that the AFDC recipient population may contain a substantial number of individuals who have difficulty with reading comprehension.

4. Generally it is not advisable to include too much information in a notice of this type. The more information that is presented at one time, the greater the likelihood that the reader will miss something important. Here, the section of the notice dealing with the lump sum rule is so imbedded in the general text that it is easy to ignore or overlook.

5. The form of the notice could be improved in order to make it more likely that the AFDC recipients for whom it is intended will read the entire document. A format that used subheading to pose questions, which are answered in short paragraphs is generally a more effective way of communicating information than the format used here. The existing proposed notice crowds a great deal of information on to the page. This can be a real disincentive for those who have reading difficulties.

6. I would also suggest that future instructions be written with shorter sentences. In addition the vocabulary should be kept as simple as possible and legal jargon avoided.

ROSEMARIE J. PARK

[Jurat omitted in printing]

HENNEPIN CO ECON ASST 13CCEE
300 SO 6 ST
MINNEAPOLIS MN 55487

IN WINDCH
12/21/81
27200000466561

The Minnesota Department of Public Welfare requires that you report all income received by anyone in your household to the local welfare agency. Information reported will be used to determine your eligibility for assistance and/or the amount of your grant. Only officials of the local, state, and federal agencies who are directly involved in providing and administering assistance programs will have access to this report. Complete all sections on both sides of this form. If a question is not applicable to you, check "no" or write "not applicable" so we can be sure no oversight has occurred.

HENNEPIN CO ECON ASST 13C088
300 SC 6 ST
MINNEAPOLIS MN 55487

JENKINS KATHRYN
2223 ALDRICH AVE N
PPLS MN 55411

RECEIVED

DEC 31 1981

Report all information for the month(s) of DEC Your FEB assistance will be based on this information. If you do not return this income report by the 5th of the month, your assistance payment may be delayed or terminated, and your grant may be figured without the benefit of any of the disregards, which could make you ineligible for AFDC for that month. You will be sent a notice of any proposed action to reduce or terminate your assistance.

CHANGES IN HOUSEHOLD

Are all persons whose needs are included in your grant still living with you? ☒ Yes ☐ No → Give name of the person(s), the date the change occurred, and details:

Has an absent parent returned to your home? ☒ No ☐ Yes → Give date:

Have there been any other changes in your household (such as someone leaving or joining your household) which could affect your grant? ☒ No ☐ Yes → Give name of the person(s), the date the change occurred, and details:

Do you anticipate any changes in your household composition in the next month? ☒ No ☐ Yes → Give name of the person(s), the date the change will occur, and details:

UNEARNED INCOME

If, during the month(s) covered by this report, you or any member of your household (including a stepparent) received the income listed below, check "yes" and complete the information requested. If not, check "no" so we can be sure no oversight has occurred.

TYPE OF INCOME	RECEIVED?		AMOUNT RECEIVED	DATE(S) RECEIVED	NAME OF PERSON RECEIVING INCOME	INDICATE IF RECEIVED MONTHLY, WEEKLY, ETC. OR ONE-TIME ONLY
	YES	NO				
Social Security (RSDI)		<input checked="" type="checkbox"/>	\$			
Supplemental Security (SSI)		<input checked="" type="checkbox"/>	\$			
Unemployment Compensation		<input checked="" type="checkbox"/>	\$			
Worker's Compensation		<input checked="" type="checkbox"/>	\$			
Lump Sum Payments/Settlements		<input checked="" type="checkbox"/>	\$			
Money from Relatives or Friends		<input checked="" type="checkbox"/>	\$			
Educational Loans/Grants/Scholarships		<input checked="" type="checkbox"/>	\$			
Rent/Room/Board Payments		<input checked="" type="checkbox"/>	\$			
Contract for Deed/Annuities/Dividends		<input checked="" type="checkbox"/>	\$			
Alimony/Child Support		<input checked="" type="checkbox"/>	\$			
Insurance Benefits or Payments		<input checked="" type="checkbox"/>	\$			
Veteran's Benefits or Pensions		<input checked="" type="checkbox"/>	\$			
Railroad or Other Retirement Pensions		<input checked="" type="checkbox"/>	\$			
Income from Training/WIN Payments		<input checked="" type="checkbox"/>	\$			
Other income received (do not include wages or your AFDC grant)		<input checked="" type="checkbox"/>	\$			

Explain other income received:

Other than regular amounts shown above, do you anticipate a change in amount or receipt of a lump sum next month? ☒ No ☐ Yes → Give name of person who will receive it, date, amount if you know it, and details including dollar amounts:

A-63

EARNED INCOME

Complete sections A through C if, during the month(s) covered by this report, you or any member of your household (including step-parent) received earnings from employment, tips, a car or van pool, CE 17, hourly payments, a tax refund, or an Earned Income Credit.

A. EARNED INCOME - Attach all pay stubs for income received by all persons in your household during the month(s) covered by this report. If you do not attach all pay stubs, you must have the employer(s) for each employed person fill out and sign the section at the bottom of this page, or give you a signed statement listing the salary information asked for in that section.

☒ have attached all pay stubs received by all persons in my household this month.

☐ No employed persons in my household this month.

NAME	AGE	IN SCHOOL?	Total hours worked this month(s)	Other earnings not shown on pay stubs or employer's statement below	Is EITC refund part of paycheck?	Has person applied to employer for EITC as part of paycheck?
Kathryn Jean King	32	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	103 1/2		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	NO

B. DEPENDENT CARE EXPENSES - Complete this section if any employed person has expenses for dependent care for a child or incapacitated adult which allows them to be employed. Expenses will be allowed only for those children or incapacitated adults who are receiving AFDC. Complete the following information for each child or incapacitated adult. Use additional sheets if necessary.

Name of child or incapacitated adult	Rate	per	hour	day	week	Name and address of provider
	\$	Total this month				
	\$	Total number of days this month				

C. CHANGES IN JOB STATUS

Did you or any member of your household (including a stepparent) stop working, start working, reduce hours, or change jobs for any reason during the month(s) covered by this report? ☒ No ☐ Yes - Give name of person, date change occurred, type of change, and reason:

Did anyone in your household refuse employment for any reason during the month(s) covered by this report? ☒ No ☐ Yes - Give name of person, date, and reason:

Were you or anyone in your household on strike on the last day of this month? ☒ No ☐ Yes - Name of person:

Do you anticipate any changes in the income or hours of yourself or any member of your household (including a stepparent) in the next month (start work, stop work, reduced or increased hours, pay raise)? ☒ No ☐ Yes - Give name of person, date of anticipated change, and details including dollar amounts:

SELF-EMPLOYMENT

Are you self-employed (includes in-home child care)?

☐ Yes ☐ No

Gross income from self-employment: \$ _____
(Attach receipts or other verification of this income.)

If you provide child care services in your home, check one:

☐ I claim 60% of gross income from child care for expenses.
☐ I claim actual expenses.

→ You must also itemize expenses (on a separate sheet of paper) and attach receipts, unless you are claiming the 60% of gross child care income.

OTHER

If there is a stepparent in your household, list the amounts the stepparent pays for dependents not living in your household:

\$ _____

Are you or anyone in your household currently receiving Food Stamps? ☐ No ☒ Yes - The information on this form will be shared with Food Stamp staff in order to calculate your Food Stamp benefits.

SIGNATURES

I understand that this information will be used by the local welfare agency to determine my assistance, and that the information on this form may result in an increase, decrease, or termination of my assistance. I understand that if I do not agree with the action taken by the local agency, I have the right to appeal that action by writing or calling the local welfare office or the Appeals Office, Minnesota Department of Public Welfare, Centennial Office Building, St. Paul, MN 55155.

I declare that I have reported all income received by myself and all persons in my household. I further declare that this report has been examined by me and to the best of my knowledge and belief is a true and correct statement of every material point. I understand that if I knowingly withhold information or provide false information on this form, I may be prosecuted for fraud.

Signature of person receiving assistance

Signature of spouse (if included in grant)

Current phone number

Date

Kathryn Jean King

Raymond Jenkins

588-9252

12-27-86

TO BE COMPLETED BY EMPLOYER IF ALL PAY STUBS ARE NOT ATTACHED

Name of employed person	DATE PAID	NUMBER OF HRS	GROSS WAGES	TIPS & BONUSES	EARNED INCOME TAX CREDIT
Place of employment					
Signature					

A-65

HENNEPIN CO ECON AST 13C08E
300 SO 6 ST
MINNEAPOLIS MN 55487

FCLD SO ADDRESS SHOWS IN WIND
01/21/82
27200000466561

The Minnesota Department of Public Welfare requires that you report all income received by anyone in your household to the local welfare agency. Information reported will be used to determine your eligibility for assistance and/or the amount of your grant. Only officials of the local, state, and federal agencies who are directly involved in providing and administering assistance programs will have access to this report. Complete all sections on both sides of this form. If a question is not applicable to you, check "no" or write "not applicable" so we can be sure no oversight has occurred.

FEB 2 1982
RECEIVED

HENNEPIN CC ECON AST 13C08E
300 SO 6 ST
MINNEAPOLIS MN 55487

JENKINS KATHRYN
2222 ALDRICH AVE N
MPLS MN 55411

Report all information for the month(s) of
FEB 5TH Your JAN MAR

You must return this form assistance will be based on this information. If you do not return this income report by the 5th of the month, your assistance payment may be delayed or terminated, and your grant may be figured without the benefit of any of the disregards, which could make you ineligible for AFDC for that month. You will be sent a notice of any proposed action to reduce or terminate your assistance.

CHANGES IN HOUSEHOLD

Are all persons whose needs are included in your grant still living with you? ☒ Yes ☐ No → Give name of the person(s), the date the change occurred, and details:

Has an absent parent returned to your home? ☒ No ☐ Yes → Give date:

Have there been any other changes in your household (such as someone leaving or joining your household) which could affect your grant?
☒ No ☐ Yes → Give name of the person(s), the date the change occurred, and details:

Do you anticipate any changes in your household composition in the next month? ☒ No ☐ Yes → Give name of the person(s), the date the change will occur, and details:

UNEARNED INCOME

If, during the month(s) covered by this report, you or any member of your household (including a stepparent) received the income listed below, check "yes" and complete the information requested. If not, check "no" so we can be sure no oversight has occurred.

TYPE OF INCOME	RECEIVED?		AMOUNT RECEIVED	DATE(S) RECEIVED	NAME OF PERSON RECEIVING INCOME	INDICATE IF RECEIVED MONTHLY, WEEKLY, ETC OR ONE-TIME ONLY
	YES	NO				
Social Security (RSDI)			\$			
Supp' Security (SSI)			\$			
Unemployment Compensation			\$			
Worker's Compensation		<input checked="" type="checkbox"/>	\$			
Lump Sum Payments/Settlements		<input checked="" type="checkbox"/>	\$			
Money from Relatives or Friends		<input checked="" type="checkbox"/>	\$			
Educational Loans/Grants/Scholarships		<input checked="" type="checkbox"/>	\$			
Rent/Room/Board Payments		<input checked="" type="checkbox"/>	\$			
Contract for Deed/Annuities/Dividends		<input checked="" type="checkbox"/>	\$			
Alimony/Child Support		<input checked="" type="checkbox"/>	\$			
Insurance Benefits or Payments		<input checked="" type="checkbox"/>	\$			
Veteran's Benefits or Pensions		<input checked="" type="checkbox"/>	\$			
Railroad or Other Retirement Pensions		<input checked="" type="checkbox"/>	\$			
Income from Training/WIN Payments		<input checked="" type="checkbox"/>	\$			
Other income received (do not include wages or your AFDC grant)		<input checked="" type="checkbox"/>	\$			

Explain other income received:

Other than regular amounts shown above, do you anticipate a change in amount or receipt of a lump sum next month? ☒ No ☐ Yes → Give name of person who will receive it, date, amount if you know it, and details including dollar amounts:

Complete sections A through C if, during the month(s) covered by this report, you or any member of your household (including you or any parent) received earnings from employment, tips, a car or van pool, CETA hourly payments, a tax refund, or an Earned Income Credit.

A. EARNED INCOME - Attach all pay stubs for income received by all persons in your household during the month(s) covered by this report. If you do not attach all pay stubs, you must have the employer(s) for each employed person fill out and sign the section at the bottom of this page, or give you a signed statement listing the same information asked for in that section.

☒ I have attached all pay stubs received by all persons in my household this month.

☐ No employed persons in my household this month.

NAME	AGE	IN SCHOOL?	Total hours worked this month(s)	Other earnings not shown on pay stubs or employer's statement below	Is EITC refund part of paycheck?	Has person applied to employer for EITC as part of paycheck?
BARRY JENKINS	33	Yes	103 1/2	no	Yes	no
		No			No	

B. DEPENDENT CARE EXPENSES - Complete this section if any employed person has expenses for dependent care for a child or incapacitated adult which allows them to be employed. Expenses will be allowed only for those children or incapacitated adults who are receiving AFDC. Complete the following information for each child or incapacitated adult. Use additional sheets if necessary.

Name of child or incapacitated adult:	Rate	per	<input type="checkbox"/> hour	<input type="checkbox"/> day	<input type="checkbox"/> week	Name and address of provider:
	\$	Total this month	Total number of days this month			
		\$				

C. CHANGES IN JOB STATUS

Did you or any member of your household (including a stepparent) stop working, start working, reduce hours, or change jobs for any reason during the month(s) covered by this report? ☒ No ☐ Yes ☐ Give name of person, date change occurred, type of change, and reason:

Did anyone in your household refuse employment for any reason during the month(s) covered by this report? ☒ No ☐ Yes ☐ Give name of person, date, and reason:

Were you or anyone in your household on strike on the last day of this month? ☒ No ☐ Yes ☐ Name of person:

Do you anticipate any changes in the income or hours of yourself or any member of your household (including a stepparent) in the next month (start work, stop work, reduced or increased hours, pay raise)? ☒ No ☐ Yes ☐ Give name of person, date of anticipated change, and details including dollar amounts:

SELF-EMPLOYMENT

Are you self-employed (includes in-home child care)?

☐ Yes ☒ No

Gross income from self-employment: \$

(Attach receipts or other verification of this income.)

If you provide child care services in your home, check one:

☒ I claim 60% of gross income from child care for expenses.

☐ I claim actual expenses.

→ You must also itemize expenses (on a separate sheet of paper) and attach receipts, unless you are claiming the 60% of gross child care income.

OTHER

If there is a stepparent in your household, list the amounts the stepparent pays for dependents not living in your household:

Are you or anyone in your household currently receiving Food Stamps? ☐ No ☒ Yes ☐ The information on this form will be shared with Food Stamp staff in order to calculate your Food Stamp benefits.

SIGNATURES

I understand that this information will be used by the local welfare agency to determine my assistance, and that the information on this form may result in an increase, decrease, or termination of my assistance. I understand that if I do not agree with the action taken by the local agency, I have the right to appeal that action by writing or calling the local welfare office or the Appeals Office, Minnesota Department of Public Welfare, Centennial Office Building, St. Paul, MN 55155.

I declare that I have reported all income received by myself and all persons in my household. I further declare that this report has been examined by me and to the best of my knowledge and belief is a true and correct statement of every material point. I understand that if I knowingly withhold information or provide false information on this form, I may be prosecuted for fraud.

Signature of person receiving assistance

Signature of spouse (if included in grant)

Current phone number

Date

Barbara Jenkins

Barbara Jenkins

588-9252

1-31-82

TO BE COMPLETED BY EMPLOYER IF ALL PAY STUBS ARE NOT ATTACHED

Name of employed person	DATE PAID	NUMBER OF HRS.	GROSS WAGES	TIPS & BONUSES	EARNED INCOME TAX CREDIT
Place of employment					
Employer's signature					

STATE OF MINNESOTA
Department of Public Welfare
Centennial Office Building
St. Paul, Minnesota 55155

County: Hennepin

Application Number:

Docket Number: 10564

Appeal of Kathryn Jenkins for AFDC
FINDINGS OF FACT AND DECISION OF
STATE AGENCY ON APPEAL

The above entitled matter came on for hearing before the undersigned Referee on the 22nd day of December, 1983, on the appeal of the above-named petitioner from the decision of the Hennepin County Welfare Board in respect to his application.

Those present and participating in the hearing were:

Kathryn Jenkins, Petitioner

Mary Grau, Attorney

Susan Bay, Principal Financial Worker

Patrick Figge, County Advocate

Evidence was thereupon adduced on behalf of the petitioner in support of his application, and said Referee, having heard the same and being fully advised in the premises, makes the following findings of fact:

KATHRYN JENKINS—AID TO FAMILIES WITH
DEPENDENT CHILDREN

1. The Petitioner, her spouse, and their four minor children have received an Aid to Families with Dependent Children grant through the Hennepin County Welfare Department since November, 1982. Eligibility has been based on need and on the incapacity of her spouse.

2. The Petitioner on an unspecified date wrote a letter of appeal to the State Agency. This letter was received by it on

November 3, 1983. The Petitioner appealed in timely fashion the proposed termination of the AFDC grant and Medical Assistance eligibility effective December 1, 1983. Because of the appeal, the proposed actions were not taken.

3. The Petitioner's spouse has been incapacitated since suffering an injury on November 19, 1979. At the time of the AFDC application the family advised that a Workman's Compensation claim was pending and that social security disability was pending. The family was not advised that any lump sum payments which it might receive would be prorated so as to affect their AFDC eligibility for ensuing months. It was not advised of same at any time prior to November 2, 1983.

4. The Petitioner's spouse received a lump sum social security disability payment in the amount of \$5752 on October 31, 1983. The family was many months behind in its home mortgage payments and on October 24, 1983, was notified by Twin City Federal Savings and Loan Association that if the delinquency and inspection fee were not paid by 12:00 noon on October 31, 1983, the loan would be given to its attorneys to commence foreclosure proceedings. They thus took the check in the amount of \$5752 to Twin City Federal. Payment of \$3863.75 was made on the mortgage and they were given \$1888.25 from the check. They paid on October 31, 1983, \$1366 on an automobile repair bill incurred over a year earlier, with the understanding that same would be paid when/if a lump sum payment were received. One hundred and fifty dollars was paid to the attorney representing Mr. Jenkins in his Workman's Compensation and Social Security matters. Purchases of personal items, clothing, etc., totalling \$344.19 were made.

5. The Petitioner telephoned her County Agency Financial Worker on November 2, 1983, to advise of the lump sum payment and to ask to come to the County Agency offices to pre-

sent the receipts for expenditures from it. She was advised that the lump sum had to be considered as being available to meet need.

6. The need standard for the family unit is \$724 per month. Because of recoupment of a past overpayment, it did not actually receive that amount each month. It received \$688 each month. The County Agency considered that through its error, overpayments were made in the amount of \$724 monthly for the months of October and November, 1983. It determined that eligibility would not exist through the month of March, 1984, and that if eligibility existed for April, 1984, it would not be for a full grant.

7. Counsel for Petitioner was granted a period of two weeks to submit a written memorandum and Advocate for the County Agency was granted ten days in which to respond to same. Such communications have been received and the record is closed as of February 7, 1984.

CONCLUSIONS

1. The County Agency acted correctly in accordance with the provisions of Attachment 13 to Commissioner of Public Welfare Instructional Bulletin #82-3 in the situation before us. Argument by Counsel for Petitioner that federal courts in other than the Eighth District have found the interpretation of the federal regulations as noted in Attachment 13 which applied to all and not to just employed AFDC recipients, to be invalid is noted. Until the federal district court for Minnesota or the Eighth Circuit Court of Appeals voids the provisions of attachment 13, the Referee must submit recommended Orders in compliance with same. The Referee notes, without further comment, Counsel's argument that the Attachment 13 violates the provisions of 45 Code of Federal Regulations 233.20(a) (3) (ii) (D), which require that only net income and resources available for current use are to be considered available both

when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the ability to make such sum available for support and maintenance.

2. DPW Rule 44 at B. 11. says in effect what is said in 45 CFR 206.10 at (a) (2) (i). The Rule cite reads:

"The local agency shall inform applicants and recipients of the availability of all programs, the benefits and limitations of each, the areas of client choice among and within programs and the results of such choices, the items concerning eligibility or payment which must be reported if they change, the time within which such reports must be made, and any other policies or actions which have a direct effect on recipients."

Advocate for the County Agency addresses this issue in his January 26, 1984, memorandum, by stating in part:

" . . .

The county also believes, as in prior administrative hearings on this issue, that, for the sake of continuity, the responsibility for providing eligibility information to AFDC recipients regarding treatment of lump sum payments under OBRA rests with the State Department of Public Welfare and not with the local agency. With that understanding, this agency has not authored any directives to its' (sic) AFDC clientele regarding such lump sum 'treatment.'

. . ."

Advocate's argument is quoted for the sake of calling the attention of the Deputy Commissioner of Public Welfare to it. As far as the effect on the Petitioner the result is the same regardless of whether the State Agency or the County Agency, or both, erred. Error in the form of not furnishing information there was and because of the lack of information, the

Referee must recommend that the County Agency be reversed in its proposed termination of the Petitioner's AFDC grant and MA eligibility.

ORDER

IT IS THEREFORE ORDERED that according to the Findings of Fact and Conclusions herein, the County Agency is reversed in its proposed termination of the Petitioner's AFDC grant and MA eligibility, and

IT IS FURTHER ORDERED that the reason for reversal is that the Petitioner was not furnished relevant information in accordance with DPW Rule 44 B. 11.

[Not Signed]

EVERETT HEDMAN

Francis E. Giberson

Appeals Referee Dict. 2/7/84

Deputy Commissioner

Date: February 28, 1984

Date: [Left Blank]

cc: Kathryn Jenkins, Petitioner

Mary Grau, Attorney

Barb Stromer, IM

Sue Wruck, QC

Hennepin CWD ATTEN: Patrick Figge, County Advocate

KATHRYN JENKINS APPEAL—AID TO FAMILIES WITH DEPENDENT CHILDREN DOCKET NUMBER 10564 AMENDED CONCLUSIONS

1. The Findings of Fact in the Proposed Order are adopted in their entirety.

2. The Conclusions in the Proposed Order, except for references to Federal and State Regulations, are rejected in their entirety. The County Agency applied the provisions of Public

Welfare Instructional Bulletin #82-3 which related to the treatment of lump sum payments as income to AFDC households.

Treatment of Lump Sums

Note: Lump sums received before October 1, 1981 or in a month when a person is not a recipient of AFDC are not subject to the provisions outlined below.

When a member of an Assistance unit receives a lump sum payment, that payment shall be added together with any other unearned income and with any earned income which remains after application of the disregards:

$$\begin{array}{r}
 \text{lump sum payment*} \\
 + \\
 \text{other unearned income} \\
 + \\
 \text{other earned income} \\
 = \\
 \text{combined amount.}
 \end{array}$$

1. If the combined amount *does not exceed* the standard of need applicable to the assistance unit, the assistance unit is eligible, presuming other factors of eligibility are met. The payment amount is determined according to the usual method of calculating the payment amount (Example #1 below).

2. If the combined amount *does exceed* the standard of need applicable to the assistance unit, the assistance unit is ineligible. The following calculation is performed to determine how many months the assistance unit is ineligible for assistance:

$$\begin{array}{l}
 \text{combined amount} \\
 \hline
 \text{standard of need} = \text{whole number} + \$ \text{remainder}
 \end{array}$$

The assistance unit is ineligible for assistance for the whole number of months resulting from that division,

regardless of whether the lump sum is still available. The dollar remainder is treated as if it is income in the first month following the period of ineligibility, and must be added to any other income in that month. If that total is in excess of the standard of need in that month, ineligibility results for that month. However, that excess may not be carried forward to the following month because income remaining after the division described above (the dollar remainder) may only be carried forward one month (Example #3).

The period of ineligibility starts with the month of receipt of the lump sum (Examples #2-5).

While the County Agency should have advised the Petitioner of the lump sum rule and how any Worker's Compensation or Disability payments would be treated, the question does arise regarding whether the recipients could have acted any differently if they *had* known.

The Federal policy regarding the treatment of lump sum payments is punitive and ignores the basic purposes of the AFDC Program. We do not like the Order in this case and would do anything to avoid the harsh result. The State Agency must comply with Federal Regulations as those regulations have been interpreted by legal counsel. Neither our legal counsel or State Agency staff believe this is a good policy, but we have verified our interpretation with the Federal Agency on numerous occasions. The effect of the Federal policy is to deprive children of the minimum support available in an already insufficient AFDC grant. It does not please us to affirm the termination of the Petitioner's grant, but we see no alternative within current Federal policy.

The Minnesota Department of Public Welfare has joined in a suit over the issue of "availability" of lump sum payments

but the State Agency is obligated to enforce the policy until such time as the Federal Regulation is changed or a court disposes of it through the judicial system.

— AMENDED ORDER

IT IS THEREFORE ORDERED that, according to the Findings of Fact and Amended Conclusions, the County Agency is affirmed in its proposed termination of the Petitioner's AFDC grant and MA eligibility.

FRANCIS E. GIBERSON

Deputy Commissioner

Date: August 9, 1984

LJ/06

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DEPARTMENT OF ECONOMIC ASSISTANCE

F2282L (11-82)
Overpayment
Letter



- ☐ ACCOUNTING
☒ AFDC
☐ GENERAL ASSISTANCE
- ☐ ADMINISTRATION
☐ COLLECTIONS SERVICES
☐ ADULT AND MEDICAL
☐ FOOD STAMPS

KATHRYN DEUKENS
2223 ALDRICH AVE N.
MPLS, MN 55411

9-5-84
Date

Dear Ms DEUKENS:

During the month(s) OCT, NOV '83, DEC '83, JAN FEB MAR APR '84 MAY '84- you were overpaid a total of \$ 546.44 in Aid to Families with Dependent Children (AFDC) payments. The reason for this overpayment is LUMP SUM (RSDL)

SOCIAL SECURITY DISABILITY PAYMENT AND THE LOSS OF APPEAL FOR INELIGIBILITY FOR THIS PERIOD.

☒ A computation of the overpayment is included on the attached page(s).

Recoupment of overpayments will be initiated in the first possible month. AFDC guidelines now require recoupment regardless of whether you have earned income. If your AFDC case is terminated before this overpayment is recovered, any remaining overpayment will be referred to Hennepin County Central Collections. If you reapply for AFDC, any uncollected balance of this overpayment will be subject to recoupment.

Please contact your Financial Worker if you have any questions regarding this overpayment. You are entitled to an agency conference to clarify any questions regarding this overpayment. You may arrange voluntary repayments in addition to the specific amount that will be recouped.

Sincerely,

David Thorpe

DAVID THORPE
SR. FW 031
AFDC FIELD
348-2520

Financial Worker
Phone:

NOTICE OF YOUR RIGHT TO AN APPEAL HEARING

If you disagree with this determination of overpayment, you may request an appeal within 30 days of this notification. (If you show good cause for not appealing within the 30-day limit, the state agency can accept your appeal for up to 90 days following the date of notification.) If your appeal request is made within 30 days and is received before the effective date of the initial action to begin recoupment of this overpayment, you may have assistance determined without application of the specified level of recoupment.

A-79

EXPLANATION OF COMPUTATION

AFDC OVERPAYMENT

KATHRYN JENNINGS

You were overpaid by the difference between the AFDC grant(s) you received and the amount(s) you would have received if your income had been correctly budgeted.

(A) 1983 (1) GRANT FACTORS Income during SEP Grant for _____ (2) GRANT FACTORS Income during NOV Grant for _____ (3) GRANT FACTORS Income during DEC Grant for _____

(B) FAMILY INCOME
Gross Earned Income.....1 \$ _____
Earned Income Tax Credit.....2 _____
Total Gross Earned Income (1 + 2).....3 _____
Unearned Income... ASD 1.. 5752 ÷ 724 = 7.94...4 724 ①
Total Monthly Gross Income (3 + 4).....5 _____

1 \$ _____
2 _____
3 _____
4 724 ②
5 _____

(C) GROSS INCOME TEST
Need Standard \$ 724 x 1.5 (150%).....6 \$ 1086
(If line 5 is equal to or greater than line 6, then no eligibility)

6 \$ 1086
7 \$ _____
8 _____
9 _____
10 _____
11 _____
12 _____

(D) EARNED INCOME AFTER DISREGARDS
Work Expenses (\$75 maximum).....7 \$ _____
Dependent Care (\$160 maximum each).....8 _____
Total Work Expenses (7 + 8).....9 _____
Income After Work Expenses (3 - 9).....10 _____
= \$30 ÷ 1/3 = Work Incentive (based on 10).....11 _____
Net Earned Income (10 - 11).....12 _____

7 \$ _____
8 _____
9 _____
10 _____
11 _____
12 _____

(E) MONTHLY GRANT
Need Standard.....13 \$ _____
Net Income (4 + 12).....14 _____
AFDC Grant (13 - 14).....15 _____

13 \$ _____
14 _____
15 _____

(F) MONTH'S GRANT PRORATED
AFDC Grant (15) x Decimal Rate.....16 \$ _____

16 \$ _____

GRANT ACTUALLY RECEIVED 688 *
CORRECT GRANT AMOUNT - 0
OVERPAYMENT = 688

GRANT ACTUALLY RECEIVED 688 *
CORRECT GRANT AMOUNT - 0
OVERPAYMENT = 688

GRANT ACTUALLY RECEIVED 688 *
CORRECT GRANT AMOUNT - 0
OVERPAYMENT = 688

TOTAL OVERPAYMENT 2064. FOR MONTHS OF SEP, NOV, DEC

*NOTE: If the GRANT ACTUALLY RECEIVED included an adjustment for a prior month's underpayment, the amount of the adjustment should be subtracted from the amount of the GRANT ACTUALLY RECEIVED. If the GRANT ACTUALLY RECEIVED included an adjustment for recoupment, the full amount of that month's recorded recoupment must still be recovered.

A-81

EXPLANATION OF COMPUTATION

AFDC OVERPAYMENT

STARRYN JARVIS

You were overpaid by the difference between the AFDC grant(s) you received and the amount(s) you would have received if your income had been correctly budgeted.

(A) '84 (1) GRANT FACTORS (2) GRANT FACTORS (3) GRANT FACTORS
Income during Income during Income during
Grant for JAN FEB MAR

(B) FAMILY INCOME
Gross Earned Income.....1 \$
Earned Income Tax Credit.....2
Total Gross Earned Income (1 + 2).....3
Unearned Income.....4 ⑤
Total Monthly Gross Income (3 + 4).....5 ⑥

(C) GROSS INCOME TEST
Need Standard \$ 726 x 1.5 (150%).....6 \$ 1086
(If line 5 is equal to or greater than line 6, then no eligibility)

(D) EARNED INCOME AFTER DISREGARDS
Work Expenses (\$75 maximum).....7 \$
Dependent Care (\$160 maximum each).....8
Total Work Expenses (7 + 8).....9
Income After Work Expenses (3 - 9).....10
= \$30 + 1/3rd Work Incentive (based on 10).....11
Net Earned Income (10 - 11).....12

(E) MONTHLY GRANT
Need Standard.....13 \$
Net Income (4 + 12).....14
AFDC Grant (13 - 14).....15

(F) MONTH'S GRANT PRORATED
AFDC Grant (15) x Decimal Rate.....16 \$

GRANT ACTUALLY RECEIVED 688 GRANT ACTUALLY RECEIVED 688 GRANT ACTUALLY RECEIVED 688
CORRECT GRANT AMOUNT - 0 CORRECT GRANT AMOUNT - 0 CORRECT GRANT AMOUNT - 0
OVERPAYMENT = 688 OVERPAYMENT = 688 OVERPAYMENT = 688
TOTAL OVERPAYMENT 2064 FOR MONTHS OF JAN, FEB, MAR '84

*NOTE: If the GRANT ACTUALLY RECEIVED included an adjustment for a prior month's underpayment, the amount of the adjustment should be subtracted from the amount of the GRANT ACTUALLY RECEIVED. If the GRANT ACTUALLY RECEIVED included an adjustment for recoupment, the full amount of that month's recorded recoupment must still be recovered.

A-83

EXPLANATION OF COMPUTATION

AFDC OVERPAYMENT

KATHRYN JENKINS

You were overpaid by the difference between the AFDC grant(s) you received and the amount(s) you would have received if your income had been correctly budgeted.

(A) 84 (1) GRANT FACTORS (2) GRANT FACTORS (3) GRANT FACTORS
Income during APRIL Income during MAY Income during MAY
Grant for APRIL Grant for MAY Grant for MAY

(B) FAMILY INCOME
Gross Earned Income.....1 \$
Earned Income Tax Credit.....2 \$
Total Gross Earned Income (1 + 2).....3
Unearned Income....BALANCE OF RSDI.....4 734.00
Total Monthly Gross Income (3 + 4).....5

(C) GROSS INCOME TEST
Need Standard \$ 724 x 1.5 (150%).....6 \$ 1086
(If line 5 is equal to or greater than line 6, then no eligibility)

(D) EARNED INCOME AFTER DISREGARDS
Work Expenses (\$75 maximum).....7 \$
Dependent Care (\$160 maximum each).....8 \$
Total Work Expenses (7 + 8).....9
Income After Work Expenses (3 - 9).....10
*\$30 + 1/3" Work Incentive (based on 10).....11
Net Earned Income (10 - 11).....12

(E) MONTHLY GRANT
Need Standard.....13 \$
Net Income (4 + 12).....14
AFDC Grant (13 - 14).....15

(F) MONTH'S GRANT PRORATED
AFDC Grant (15) x Decimal Rate.....16 \$

GRANT ACTUALLY RECEIVED 688 GRANT ACTUALLY RECEIVED 688 GRANT ACTUALLY RECEIVED 688
CORRECT GRANT AMOUNT - 0 CORRECT GRANT AMOUNT - 40 CORRECT GRANT AMOUNT - 40
OVERPAYMENT = 688 OVERPAYMENT = 648 OVERPAYMENT = 648
TOTAL OVERPAYMENT 1336 FOR MONTHS OF APRIL + MAY 84

*NOTE: If the GRANT ACTUALLY RECEIVED included an adjustment for a prior month's underpayment, the amount of the adjustment should be subtracted from the amount of the GRANT ACTUALLY RECEIVED. If the GRANT ACTUALLY RECEIVED included an adjustment for recoupment, the full amount of that month's recorded recoupment must still be recovered.

BEST AVAILABLE COPY

A-85

MP SUM DETERMINATION

A lump sum payment totaling \$ 5752 was received by the legally responsible caretaker or other member of your AFDC assistance unit during the month of OCTOBER 83 and was received by RAYMOND DENNIS SOCIAL SECURITY DISABILITY (PSDI).

Because the lump sum combined with other net available income received during that month exceeds the payment standard for your assistance unit for that month, a period of ineligibility exists.

The length of ineligibility is determined as follows:

Lump Sum	\$ <u>5752</u>
Disregard*	- <u>0 -</u>
SUBTOTAL	= \$ <u>5752</u>
Net Earned Income	+
Unearned Income	+
TOTAL	= <u>5752</u>

The total of \$ 5752 is divided by your payment standard of \$ 724.00 which produces a period of ineligibility of 7 months and the difference of \$ 684 is considered available for the month of APRIL 1984.

☒ You have already received AFDC payment for the ineligible month/s of OCT NOV DEC 83 JAN FEB MAR APR MAY 1984. The AFDC payment totaling \$ 5464 received for those months is an overpayment.

☐ Because the period of your determined total AFDC ineligibility due to receipt of this lump sum continues through subsequent month/s, your AFDC case will be canceled and you and the members of your assistance unit may again be eligible in the month of 198. The ineligible members of the assistance unit are:

☐ The amount, source and date of receipt of the lump sum and other applicable income have been reported but have not been verified. This verification will be required in the event that a reapplication for assistance is made in behalf of any of the ineligible members of your assistance unit. It may be advantageous to provide immediate verification as it may produce a reduction in the amount of your overpayment or period of ineligibility.

* Only to be applied if the lump sum is due to the receipt of a Federal Earned Income Tax Credit or other form of non-recurring earned income.

THIRD-PARTY DEFENDANT'S RESPONSE TO
THIRD-PARTY PLAINTIFF'S INTERROGATORIES
(SET III) AND REQUEST FOR PRODUCTION
OF DOCUMENTS

[Caption omitted in printing]

Pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure, Federal Defendant submits the following response to Third-Party Plaintiff's Interrogatories and Request for Production of Documents:

INTERROGATORY NO. 1:

State your name, title and business address.

Answer:

Jo Anne B. Ross, Associate Commissioner for Family Assistance, Social Security Administration, Office of Family Assistance, Transpoint Building, 2100 Second Street, S.W., Washington, D.C. 20201.

INTERROGATORY NO. 2:

Describe your duties, functions and responsibilities in HHS.

Answer:

In my capacity as Associate Commissioner for Family Assistance, I have overall responsibility for the administration of the Federal Aid to Families with Dependent Children (AFDC) Program under title IV of the Social Security Act.

INTERROGATORY NO. 3:

Identify all persons whom you have consulted or interviewed in preparation of the responses to these Interrogatories.

Answer:

- Michael H. de Maar—Director,
Policy and Evaluation, Office of Family Assistance
Washington, D.C.
- The Department's Office of General Counsel,
Social Security Division

INTERROGATORY NO. 4:

State which of the persons whose names are contained in the answers to Interrogatory No. 3:

- a. Have made written or recorded statements to you concerning this case;
- b. Are the subject of memoranda by you regarding interviews or conversations concerning any issue in this case; and

In addition, identify each person in whose custody each such written or recorded statement and memorandum is presently located.

Answer:

(a) Not applicable. None of the persons specified in Interrogatory No. 3 made written or recorded statements to me concerning this case, except to convey these interrogatories and pleadings.

(b) Not applicable. None of the persons identified in Interrogatory No. 3 is the subject of any known memoranda by the Federal defendant or any other person acting on behalf of the United States Department of Health and Human Services.

INTERROGATORY NO. 5:

State whether HHS requires Minnesota to give immediate notice, either written or oral, to an AFDC assistance unit of the lump sum rule set forth in 45 CFR § 233.20(a)(3)(ii)(D) (recodified as 45 CFR § 233.20(a)(3)(ii)(F) effective October 1, 1984), including the length or manner of calculation of the disqualification period and any exceptions to the rule, upon obtaining information that the assistance unit may or will receive lump sum income in the future but before the unit reports actual receipt of lump sum income.

Answer:

Federal regulations at 45 CFR § 206.10(a)(2)(i) and (ii) require a State agency to inform AFDC applicants and recipients about eligibility requirements and their rights and obligations under the AFDC Program. Under these requirements, States are fully expected to establish policies to ensure that individuals are provided information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program and related services available. This would include generally advising applicants and recipients of their obligation to report receipt of lump sum income, the operation of the lump sum rule, and the effect on eligibility for assistance. However, not until a State takes action to terminate, discontinue, suspend or reduce assistance is the State required to give timely and adequate written notice of the specific adverse action. See 45 CFR § 205.10(a)(4)(i) subparagraphs (A) and (B). In accordance with these provisions, "timely" means that the notice is mailed at least 10 days before the date of action, that is, the date upon which the action would become effective. "Adequate" means a written notice that includes a statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, explanation of the individual's right to request an evidentiary hearing (if provided) and a State agency hearing, and the circumstances under which assistance is continued if a hearing is requested. Where a lump sum payment is the reason for adverse action, it is the responsibility of the State to advise the recipient consistent with the Federal requirements outlined above.

INTERROGATORY NO. 6:

If your answer to Interrogatory No. 5 is affirmative, state the legal basis for your position.

Answer:

The statutory authority for the regulatory provisions discussed in Interrogatory No. 5 is section 1102 of the Social Security Act.

INTERROGATORY NO. 7:

State whether HHS requires Minnesota to give immediate notice, written or oral, of the lump sum rule in addition to the written predetermination notice required by 45 CFR § 206.10 (a) (7) to an assistance unit which reports receipt of lump sum income.

Answer:

Refer to the full discussion in the Answer to Interrogatory No. 5 which states the requirements that a State provide written or oral information as appropriate to individuals regarding the lump sum rule. Note that the requirements of 45 CFR § 206.10(a) (7) are cross-referenced to 45 CFR § 205.10 which are discussed at length in Interrogatory No. 5.

INTERROGATORY NO. 8:

If your answer to Interrogatory No. 7 is affirmative, state the legal basis for your position.

Answer:

The statutory authority for the regulatory provisions referenced in Interrogatory No. 7 is section 1102 of the Social Security Act.

INTERROGATORY NO. 9:

Is it the position of HHS that 45 CFR § 206.10(a) (2) (i) requires Minnesota to publicize the lump sum rule, including the length or manner of calculation of the disqualification period and any exceptions to the rule, in specifically developed pamphlets or bulletins for general distribution to AFDC applicants and recipients?

Answer:

A State has considerable latitude in the development of procedures it shall adopt to ensure effective administration of the

AFDC program. Provisions at 45 CFR § 206.10(a) (2) (i) do not require a State to publicize the lump sum rule or any other eligibility requirements in specifically developed pamphlets or bulletins. However, where a State elects this approach as one method to inform applicants and recipients about eligibility requirements, guidelines under the provisions at 45 CFR § 206.10(a) (2) (i) require that such pamphlets or bulletins explain the rules regarding eligibility in simple, understandable terms. They must also be publicized and made available for general distribution to the recipient population.

INTERROGATORY NO. 10:

Identify the person who helped to prepare your answers to these Interrogatories.

Answer:

— Michael H. de Maar

Director, Office of Policy and Evaluation

Office of Family Assistance, Washington, D.C.

— The Department's Office of the General Counsel,
Social Security Division

Request:

All documents, not privileged, which interpret or address the scope or applicability of 45 CFR § 206.10(a) (2) (i).

Response:

We have searched the official files of the Office of Family Assistance in Washington, D.C. and have located no documents which interpret or address the scope or applicability of 45 CFR § 206.10(a) (2) (i).

I have reviewed the above Response to Third-Party Plaintiff's interrogatories and it is true to the best of my knowledge, information and belief.

JO ANNE B. ROSS

[Jurat omitted in printing]

Respectfully submitted,
JAMES M. ROSENBAUM
United States Attorney

Date: Nov. 7, 1984.

By: MARY L. EGAN
Assistant United States
Attorney
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Assistant Regional Attorney
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PLAINTIFFS' ANSWERS TO STATE DEFENDANT'S INTERROGATORIES SET II

[Caption omitted in printing]

The following are the answers of plaintiffs to the Interrogatories directed to them.

INTERROGATORY NO. 1:

Identify all persons whom you have consulted or interviewed pertaining to the facts or merits of Kathryn Jenkins' claims not previously identified in interrogatory responses to DHS.

ANSWER NO. 1:

None.

INTERROGATORY NO. 2:

State which of the persons whose names are contained in the answers to Interrogatory No. 1:

- a. Have made written or recorded statements to you concerning this case;
- b. Are the subject of memoranda by you of interviews or conversations concerning any issue in this case; and
- c. In addition, identify each person in whose custody each such written or recorded statement and memorandum is presently located.

ANSWER NO. 2:

- a. None.
- b. None.
- c. See above.

INTERROGATORY NO. 3:

Identify each person whom you expect to call as a witness at trial with respect to Ms. Jenkins' claims not previously identified in interrogatory responses to DHS, and set forth a brief statement pertaining to the substance of each witness's testimony, conclusions and grounds for same.

ANSWER NO. 3:

This case does not present material issues of fact. A trial on the merits is not anticipated.

INTERROGATORY NO. 4:

Identify each document and exhibit you expect to introduce at trial with respect to Ms. Jenkins' claims not previously identified in interrogatory responses to DHS, and for each document and exhibit, set forth a brief statement pertaining to its purported relevance at trial.

ANSWER NO. 4:

See answer to Interrogatory No. 3.

INTERROGATORY NO. 5:

List all income of any kind, earned or unearned, including but not limited to in kind income and any form of public or private assistance, which Ms. Jenkins, Raymond Jenkins, members of the assistance unit or any other person residing with the assistance unit has received from any source whatever from the date of Mr. Jenkins' accident alleged in paragraph 13 of the Second Complaint in Intervention to the present. Include the amount or value, form, date received, and source of such income.

ANSWER NO. 5:

1. Between 1979 and early 1981: workers' compensation benefits of \$506.00 every two weeks.
2. Between March, 1981 and February, 1982: monthly AFDC and food stamp benefits. Ms. Jenkins also had nominal income from employment as a seamstress between February, 1981 and September, 1981.
3. Workers' compensation settlement totaling \$24,819.40, received in several installments between December, 1981 and May, 1982. Out of this the family paid outstanding debts, including at least \$5,000 in attorneys fees, totaling \$22,800.
4. Between March, 1982 and October, 1982: workers' compensation benefits of \$506 every two weeks.
5. Between November, 1982 to the present: monthly AFDC and food stamp benefits.

INTERROGATORY NO. 6:

State the date the Jenkins' received the partial workers' compensation settlement referred to in paragraph 7 of the Affidavit of Kathryn Jenkins, attached to her Motion to Intervene.

ANSWER NO. 6:

December, 1981 and January, 1982.

INTERROGATORY NO. 7:

Specify each time period Ms. Jenkins or members of her family received AFDC benefits.

ANSWER NO. 7:

Between March, 1981 and February, 1982.

Between November, 1982 and the present.

INTERROGATORY NO. 8:

State whether it was Mr. Jenkins or Ms. Jenkins who completed the November, 1982 AFDC application form on behalf of the assistance unit.

ANSWER NO. 8:

Kathryn Jenkins completed the November, 1982 AFDC application.

INTERROGATORY NO. 9:

On October 31, 1983, was Ms. Jenkins aware that any policies in the AFDC assistance program had changed since the period she first obtained AFDC assistance.

ANSWER NO. 9:

On October 31, 1983 Ms. Jenkins was aware of the fact that her family was required to submit a monthly income report form even though no one in the assistance unit was employed. She was not aware of any other changes in policy.

INTERROGATORY NO. 10:

Identify each and every document which Ms. Jenkins recalls receiving from the county relating to the AFDC program.

ANSWER NO. 10:

Ms. Jenkins recalls that when her family applied for AFDC in November, 1982 they were given written information and saw a filmstrip about MA coverage options. Ms. Jenkins was not given anything in writing describing the AFDC program in November, 1982. When Ms. Jenkins had applied for AFDC in March, 1981, she recalls being given a light blue booklet

with a glossy cover which described the AFDC program. Occasionally while the family was on assistance they would receive flyers with their monthly checks. Ms. Jenkins recalls that one of these inserts described summer job opportunities for teenagers. At another time information about changes in Medical Assistance dental coverage was included with the MA card.

INTERROGATORY NO. 11:

State whether, at any time between November, 1981 and November 2, 1983, Mr. or Ms. Jenkins read the pamphlets entitled "A Program for Families: AFDC" and "Aid to Families with Dependent Children: Monthly Reporting" and printed by DHS.

ANSWER NO. 11:

Neither Mr. or Ms. Jenkins recalls receiving or reading either of these pamphlets.

INTERROGATORY NO. 12:

Identify each and every document and each and every conversation, conference, or meeting between a member of Ms. Jenkins' assistance unit and Hennepin County forming the basis for the allegations contained in paragraph 15 of the Second Complaint in Intervention that the Jenkins informed the county, at the time of their November 1982 AFDC application, that Mr. Jenkins had filed workers' compensation and Social Security disability claims.

ANSWER NO. 12:

Personal interview, November, 1982.

Application form submitted November, 1982.

INTERROGATORY NO. 13:

Describe in detail the substance of the documents, conversations, conferences and meetings identified in Interrogatory No. 12.

ANSWER NO. 13:

The Jenkins family met with Hennepin County economic assistance workers several times when they applied for AFDC in 1982. Ms. Jenkins recalls that during the second meeting, Mr. Jenkins informed the agency worker that he had claims pending for workers' compensation and Social Security disability benefits. Jenkins thinks that the intake worker put a note to that effect on the application.

INTERROGATORY NO. 14:

Identify each and every conversation, conference, or meeting between the Jenkins and the county other than those identified in Interrogatory No. 12 in which Mr. Jenkins or Ms. Jenkins recalls any discussion of the reporting procedures to be followed by an AFDC recipient who received income.

ANSWER NO. 14:

Telephone conversation between Ms. Jenkins and Hennepin County economic assistance worker on November 2, 1983.

INTERROGATORY NO. 15:

Describe in detail the substance of the documents, conversations, conferences and meetings identified in Interrogatory No. 14.

ANSWER NO. 15:

Ms. Jenkins called her financial worker to report receipt of the lump sum. She explained what had been done with the money and told the worker she had receipts. The financial worker told her that her family was expected to live on the money for a set period of time and that the family's AFDC grant would be terminated.

INTERROGATORY NO. 16:

Identify each and every document, conversation, conference, or meeting between the Jenkins and the county, other than those identified in Interrogatories Nos. 12 and 14 in which Mr. Jenkins or Ms. Jenkins recalls any discussion of the

county's treatment of income received by an AFDC recipient in determining the recipient's continued eligibility or in calculating the recipient's monthly grant.

ANSWER NO. 16:

Telephone conversation between Ms. Jenkins and Hennepin County economic assistance worker in 1981.

INTERROGATORY NO. 17:

Describe in detail the substance of the documents, conversations, conferences and meetings identified in Interrogatory No. 16.

ANSWER NO. 17:

Ms. Jenkins called her financial worker to report that she was working. She was told to send in her pay stubs every month.

INTERROGATORY NO. 18:

List expenses incurred by and paid for Ms. Jenkins' assistance unit for shelter, utilities, food, clothing, medical care, and any other expenses Ms. Jenkins believes were necessary for the health and safety of the members of the assistance unit from December, 1983 to May, 1984.

ANSWER NO. 18:

MONTHLY EXPENSES

\$370.00	principal mortgage
97.00	second mortgage
38.00	lights
60.00	gas
15.00	water
370.00	food

\$950.00

Mr. Jenkins and the children also incurred medical expenses between December, 1983 and May, 1984. Mr. Jenkins sees a physician regularly and takes daily medication. The children

saw a doctor for routine check-ups. Because the family continued to receive AFDC while their administrative appeal was pending, these expenses were covered by Medical Assistance.

INTERROGATORY NO. 19:

Did Ms. Jenkins, Mr. Jenkins or other members of the assistance unit apply for any form of assistance, including but not limited to Medical Assistance, General Assistance Medical Care, Hill-Burton funds or insurance benefits for medical expenses incurred from December, 1983 to May, 1984?

ANSWER NO. 19:

No.

INTERROGATORY NO. 20:

If the answer to Interrogatory 19 is negative, state each and every reason why they did not apply for benefits.

ANSWER NO. 20:

Ms. Jenkins appealed the termination of her family's AFDC grant before the effective date of the termination. Consequently, the family's AFDC and categorically related MA coverage continued while the administrative appeal was pending. Final administrative action on the appeal wasn't taken until August 9, 1984.

INTERROGATORY NO. 21:

If the answer to Interrogatory No. 20 is affirmative, identify each such request including date of request, type of request, date made, to whom, whether it was accepted or rejected, by whom, date notice was given of acceptance or rejection, and, if accepted, amount of assistance received.

ANSWER NO. 21:

Not applicable.

INTERROGATORY NO. 22:

Has any legal action been commenced against Ms. Jenkins or Mr. Jenkins to recover payment for medical or other ex-

penses incurred by a member of the assistance unit between December, 1983 to May, 1984? If so, state the name(s) of the party or parties commencing suit, the caption, venue, date filed, relief requested, disposition, if any, and current status of the case.

ANSWER NO. 22:

Not to the Jenkins' knowledge.

INTERROGATORY NO. 23:

List any changes in the size of Ms. Jenkins' assistance unit or any other circumstances which would have changed the amount of the AFDC monthly grant received by the assistance unit from December, 1983 to May, 1984 had the assistance unit continued to receive AFDC.

ANSWER NO. 23:

The assistance unit did continue to receive AFDC between December, 1983 and May, 1984.

INTERROGATORY NO. 24:

State which, if any, portion of the lump sum alleged in paragraph 16 of the Second Complaint in Intervention became unavailable to Ms. Jenkins or the members of her assistance unit due to circumstances beyond the assistance unit's control, including a description of the circumstances claimed to be beyond the assistance unit's control.

ANSWER NO. 24:

The lump sum alleged in paragraph 16 of the Second Complaint in Intervention was used to pay pre-existing debts and to purchase winter clothes for the Jenkins children. Ms. Jenkins does not alleged that these were circumstances beyond her family's control as that phrase is used in the federal regulations.

INTERROGATORY NO. 25:

List any changes in the size of Helen Stewart's assistance unit or any other circumstances which would have changed

the amount of AFDC monthly grant received by the assistance unit from November, 1982 to February, 1984 had the assistance unit continued to receive AFDC.

ANSWER NO. 25:

Increases in the AFDC standard of need from \$368 per month for one adult and one child to \$393 per month as of February 1, 1984, and then again from \$393 to \$412 in July, 1983.

INTERROGATORY NO. 26:

State which, if any, portion of the lump sum alleged in paragraph 26 of the First Complaint in Intervention became unavailable to Ms. Stewart or the members of her assistance unit due to circumstances beyond the assistance unit's control, including a description of the circumstances claimed to be beyond the assistance unit's control.

ANSWER NO. 26:

Amounts available:

1. \$60 per month in medical expenses resulting from loss of MA coverage.
2. An amount equivalent to the value of the monthly food stamps that Ms. Stewart received before she received the lump sum.

Circumstances beyond the assistance unit's control:

1. Loss of MA and food stamp benefits.
2. Failure to adjust period of ineligibility to reflect increases in state standard of need.
3. Illness requiring hospitalization and extensive medication.

INTERROGATORY NO. 27:

Identify the persons who helped to prepare your answers to these Interrogatories.

ANSWER NO. 27:

None.

LAW OFFICES OF THE
LEGAL AID SOCIETY OF
MINNEAPOLIS INC.

Dated: November 5, 1984.

By: MARY G. GRAU

Attorneys for the Plaintiffs
222 Grain Exchange Building
323 Fourth Avenue South
Minneapolis, Minnesota 55415
(612) 332-1441

AFFIDAVIT OF HELEN STEWART IN SUPPORT
OF MOTION TO INTERVENE

[Caption omitted in printing]

State of Minnesota

County of Goodhue—ss.

Helen Stewart, being first duly sworn, deposes and states:

1. I am a citizen of the State of Minnesota, and I reside at 712 West Fourth Street, in the City of Red Wing, County of Goodhue, State of Minnesota.

2. I am divorced and I have custody of my minor child, Jesse, age 10. I had been receiving Aid to Families with Dependent Children for several years, up to and including the month of November, 1982.

3. In November, 1982, I received the sum of Five Thousand One Hundred and Eighty Dollars (\$5,180.00) as full settlement of a Workers' Compensation claim. I had received an A.F.D.C. grant of Three Hundred and sixty-eight dollars (\$368.00) for the month of November, 1982.

4. I did not have any earned income in November, 1982, the month in which I received the Workers' Compensation settlement.

5. I have numerous health problems, including ulcers, a nervous disorder and depression, and these difficulties have prevented me from working, both before receipt of the settlement in November, 1982, and since that date.

6. After duly reporting receipt of the settlement money to my welfare financial worker on November 8, 1982, she informed me that I would be ineligible for Aid to Families with Dependent Children for an unspecified number of months. She could not determine the exact number of the months, because I had lost the sheet verifying the exact amount, had cashed the check, and because of my mental and physical problems, could not recall the exact amount. Instead, I told her I had received about Five Thousand Dollars.

7. I attempted to stretch the settlement money as far as possible, and did successfully live on these funds until July of 1983, by which time my funds were exhausted. (I have indicated how this money was spent in Attachment A.) I went back to Goodhue County Welfare Department to reapply for A.F.D.C., but was told that I would not again be eligible until February, 1984, due to receipt of the Workers' Compensation settlement in November, 1982. I appealed that decision, but a hearing has not yet been scheduled.

8. I am without money or a source of income at the present time. I live in publicly subsidized housing and currently pay no rent, and I receive Food Stamps and Medical Assistance for myself and my child. However, I still owe N.S.P. \$366.00 in arrearages and face imminent shut-off on October 5, 1983, if the fee is not paid. I was hospitalized for my ulcers and nerves in April, 1983, at a time when I had no medical coverage. The bill I owe to Saint John's Hospital in Red Wing is

approximately Two Thousand and Five Hundred Dollars (\$2,500.00), and the debt to my physicians, the Interstate Clinic, is approximately Nine Hundred Dollars (\$900.00). Without Aid to Families With Dependent Children, I cannot meet the cost of many of my family's most basic needs.

9. My situation is desperate, wherefore I pray this Court allow my intervention in the above-named action, grant me immediate relief, and restrain the Department of Public Welfare from applying the lump sum rule, 42 U.S.C. § 602(2) (17), to the facts of my case.

FURTHER THIS AFFIANT SAYETH NAUGHT.

By: HELEN STEWART

Date: 13th day of September, 1983.

[Jurat omitted in printing]

ATTACHMENT A INCOME

(November, 1982 through July, 1983)

1. Lump-Sum Workers' Compensation Settlement	\$5,180.00
2. Utility Allowance from Housing Authority (June and July, 1983)	60.00
3. AFDC for November, 1982	368.00
4. Utility Assistance from CAP Agency	270.00
	<hr/>
	\$5,878.00

EXPENSES

(November, 1982 through July, 1983)

1. Rent (November, 1982 through June, 1983) (reduced rent under Section 8)	230.00
2. Northern States Power (11/1982 through 7/1983)	1,125.00
3. Northwestern Bell	274.00
4. Water Bill (to City of Red Wing)	75.84

5. Food (11/1982 through 7/1983)	1,800.00
6. Household & Personal Needs Items ((\$30.00 per month through 7/1983)	240.00
7. Clothing (for self & child)	250.00
8. Furniture (used couch, lounge chair, dresser, beds, end table, coffee table, lamps and stands)	350.00
9. Christmas Presents 1982 (for child, self, family)	235.00
10. Bedding & Linens	50.00
11. Child's Allowance (\$7 a week from Nov. through January, \$4 a week from Feb. through June)	167.00
12. Entertainment	
—Restaurant: \$6.00 per person average, 10 times in eight month period	60.00
—Movies: \$1.50 movie night, 12 times in eight month period	36.00
—Church Bingo (\$7.00 twice a month in eight month period)	112.00
	<hr/>
	\$ 208.00
13. Personal Loan (repaid sister Geneva Jennings for money lent to me before receipt of lump sum)	300.00
14. Medical Transportation (cab transport to clinic, \$5.00 roundtrip, 24 trips for myself, 5 trips for my son)	145.00
15. Prescription Drugs (for ulcers, nerves)	350.00
16. Non-prescription Drugs (Tylenol, cold medicine, antibiotics, sinus medications)	60.00
	<hr/>
TOTAL	\$5,859.84

AFFIDAVIT OF JOYCE OLSON

[Caption omitted in printing]

State of Minnesota

County of Yellow Medicine—ss.

Joyce Olson, being first duly sworn states:

1. I am a resident of Porter in Yellow Medicine County, Minnesota.

2. I have two children.

3. I had been a recipient of Aid to Families with Dependent Children (AFDC) from February 1981 until August 1983 when my grant was repaid and I was terminated for the month of September due to the receipt of a lump sum payment of \$1,120.90 during August 1983.

4. My husband Ronald has been ill for an extended period of time and because of his illness, he had applied for Social Security disability and Supplemental Security Income (SSI) in May, 1981.

5. We had to rely on AFDC and General Assistance while we were waiting for the decision in the Social Security case.

6. My husband received a decision in December, 1982 in which an Administrative Law Judge of the Social Security Administration found him disabled for the period of time from December 17, 1980 to February 8, 1982.

7. The first benefits I received from this decision came in the form of child's benefits for my daughter (Ronald's stepdaughter) on June 6, 1983. The amount was \$1,120.90. I promptly reported the receipt of this money to the Yellow Medicine County Welfare Department. I believe I reported it on June 8, 1983. I was not informed at that time that the receipt of this money would affect my AFDC grant. We did have some bills which had accumulated during Ronald's illness. I had paid some of our bills prior to speaking with the Financial Worker and after talking to the Financial Worker I as-

sumed I could pay more bills with the money. She told me that they were interested in the checks Ronald and I would receive from Social Security.

8. Neither my husband or myself had any earned income during the months of June and July, 1983.

9. Then on about July 8, 1983 I received a notice that I was going to have my AFDC reduced for August to \$77.00 because of the payment received in June. At the time I received the notice I had none of the \$1,120.90 left. I spent it to pay household bills and personal needs for Tanya, my daughter.

10. I appealed from the action of the Welfare Department and I am awaiting a decision from the State Department of Public Welfare.

11. When I received the most recent check from Social Security, I reported it right away and I was told that I had to repay the August grant, which I did.

Further Affiant Sayeth Not.

JOYCE OLSON

Date: 16th day of September, 1983.

[Jurat omitted in printing]

AFFIDAVIT OF KATHRYN JENKINS

[Caption omitted in printing]

State of Minnesota

County of Hennepin—ss.

Kathryn Jenkins, having been sworn on oath, deposes and says the following:

1. I live with my husband Raymond and our four children at 2223 Aldrich Avenue North in Minneapolis.

2. In November of 1979 my husband was injured while

on the job. He has been unable to work since then. I am also unemployed.

3. Our family applied for benefits under the AFDC Incapacitated Parent program through Hennepin County in November of 1982. When we applied, we told the welfare department that my husband had filed a worker's compensation claim and that he had applied for Social Security disability benefits. The agency knew that we probably would be getting a settlement from either worker's compensation or Social Security while we were on AFDC, but nobody told us that if we got any money we would be expected to live on it for a set number of months. Nothing about the lump sum rule was explained to us.

4. On October 31, 1983, while we were on AFDC, my husband received a retroactive Social Security disability payment of \$5,752.00.

5. That same day, we paid \$3,863.75 to Twin City Federal Savings & Loan to prevent our house from going into foreclosure. We also paid an outstanding car repair bill to Fred's Garage of \$1,366.00. We used the rest of the money to make a payment to my husband's worker's compensation lawyer, and to buy some winter clothes, coats and boots for our children.

6. On November 2, 1983 I called my caseworker at Hennepin County to tell her about the settlement. During our conversation, she told me for the first time that we were supposed to live on the money for an extended period of time.

7. I had no idea that we were expected to save the money and live on it. Once before when we had been on AFDC for awhile we had received a partial worker's compensation settlement. At that time, my welfare worker told me that I should call them within 10 days to report that the money had been

received, that I should keep receipts showing how the money was spent, and that as long as I didn't spend the money foolishly we would be able to reapply for AFDC as soon as the money was gone.

8. I assumed the same procedure was in effect when we got the disability payment in October 1983. I called right away to report the payment and I kept all the receipts. I didn't think that paying bills and buying winter boots for the kids was against the rules.

9. On November 3, 1983 Hennepin County sent me a written notice saying that my family's AFDC would stop on December 1st, that we had an overpayment for October and November, and that we wouldn't be able to get AFDC again until May of 1984.

10. I filed an appeal right away. Because I appealed on time, we continued to get AFDC while the appeal was pending. The hearing took place on December 22, 1983.

11. On August 9, 1984 the state issued a final decision saying that our AFDC benefits should have been cut off in December. Now the state says I have an overpayment of over \$5,000.00 and wants us to pay all the money back.

12. My husband is still unable to work. AFDC is our family's only source of support.

KATHRYN JENKINS

Date: 6th day of September, 1984.

[Jurat omitted in printing]

AFFIDAVIT OF KATHRYN JENKINS

[Caption omitted in printing]

State of Minnesota

County of Hennepin—ss.

Kathryn Jenkins, having been sworn on oath, deposes and says the following:

1. I understand that Hennepin County is now saying that I purposely failed to tell them about partial payments on my husband's workers' compensation claim that our family got in December of 1981 and January of 1982. I never tried to hide anything from the welfare department.

2. I have looked at the monthly AFDC income reports that I submitted for December of 1981 and January of 1982 again. When I filled out the December report on December 29th, we had not received any money at all yet. We did get some money in January of 1982. I'm not sure now exactly how much it was, but I do know that most of it went directly to our attorney—we owed him \$6,500 for a previous loan that he had arranged for us. We also owed him \$5,000 in attorneys fees.

3. I can't remember why I didn't put this information down on the January, 1982 income report. I do know that I always tried to report income that we received to my financial worker promptly. Usually I called in person, and I think I did this time too. I must have forgotten to put the information down on the written report.

4. I am absolutely sure that I was told that money like the partial workers' compensation settlement would make me ineligible for AFDC until it was spent, but that I could reapply after the money was gone as long as I had receipts and hadn't spent the money foolishly. I expected that we would stop getting AFDC after we got the partial settlement in the winter of 1982. I thought our AFDC benefits would stop in February, but they didn't stop until March.

5. I know that when we applied for AFDC in November of 1982 we told the AFDC worker that my husband's workers' compensation benefits had stopped again and that this was why we were reapplying. We also told the worker that his

workers' compensation claim was still pending and that he had applied for Social Security disability benefits.

6. When we applied in November, 1982, we had to give the welfare department receipts showing how the partial settlement we had received in January had been spent. We gave them all the receipts they asked for, and we were found eligible for AFDC. We were not told that the rule had changed since the last time we were on AFDC. We weren't given any information about the lump sum rule at all.

7. The welfare department apparently says that I got a letter in September of 1981 explaining the new lump sum rule. I have been shown a copy of the letter, and don't remember receiving it. When I was shown the letter I read it over. I didn't understand the part about lump sum money. I don't think it explains what happened to our family when we got the disability settlement in October of 1983 very well.

KATHRYN JENKINS

Date: 27th day of December, 1984.

[Jurat omitted in printing]

AFFIDAVIT OF LINDA ADY

[Caption omitted in printing]

LINDA ADY, being duly sworn, states as follows:

1. I am employed by the Minnesota Department of Human Services as the Supervisor of Policy Development, Assistance Payments Division. In my position as Supervisor of Policy Development, I analyze, recommend and implement state policies for AFDC and other welfare assistance programs.

2. The AFDC program in Minnesota is supervised by the Department of Human Services and locally administered by the state's eighty-seven counties.

3. The Department of Human Services maintains a central computer file for closed and active AFDC cases in the state.

Closed cases are maintained in the computer file for a minimum of twenty-four months following closure.

4. According to Department of Human services records, approximately 53,000 AFDC cases were open in July, 1984, the most recent month for which compiled figures are available.

5. The average number of AFDC cases which are closed per month is 3,250.

6. No uniform computer code which would identify cases closed because of the receipt of a lump sum by an assistance unit is currently used. Therefore, the total number of cases closed since June 30, 1983 due to lump sum receipt is unknown.

7. While a specific lump sum closing code was used statewide for a short time following implementation of the 1981 OBRA amendments, it is no longer used. When the lump sum code was in use, approximately 25 cases were closed monthly due to lump sum receipt.

8. In my opinion, there is no practical way to identify cases closed due to lump sum receipt through the computer file. At least twelve out of forty-eight closing codes are commonly used by counties, but virtually any of the codes may have been used to close a particular case, depending upon the factual circumstances of the case and the county agency's practice.

9. In order to identify past and current recipients whose assistance was terminated due to the receipt of a lump sum since June 30, 1983, the Department of Human Services would have to direct each county to manually review all open and closed case files to determine which recipients had their assistance terminated due to lump sum receipt. Manual review of closed case files would be further complicated by the fact that many counties store their closed files alphabetically

rather than by date of closure, thus involving review of several years of closed files.

10. In my opinion, the most efficient way for the Department of Human Services to assure notification of current recipients who became ineligible for assistance for some period of time after June 30, 1983 due to lump sum receipt would be to notify all current assistance units by enclosing a notice inside a monthly mailing of the AFDC Household Report Form combined with separate mailings to current assistance units who are not scheduled to receive a Household Report Form.

11. Out of the approximately 53,000 active cases, about 38,000 receive a Household Report Form each month. Accordingly, a separate mailing would be necessary for the remaining 15,000 active cases.

12. In my opinion, the most effective way for the Department of Human Services to notify former AFDC recipients whose assistance was terminated after June 30, 1983 due to lump sum receipt would be to mail a notice to all cases closed since July, 1983.

13. On September 5, 1984 and September 6, 1984 respectively, I spoke over the telephone to Cheryl Hanks and Shirley Yunker, AFDC unit supervisors from Anoka and Dakota counties, both medium-sized counties, to obtain their estimates of the proportion of cases closed due to lump sum receipt. I also attempted to obtain estimates of the proportion of cases closed due to lump sum receipt where the lump sum arguably became unavailable to the assistance unit for reasons beyond the family's control.

14. Cheryl Hanks, Anoka County supervisor, estimated that about five percent of all case terminations were due to lump sum receipt and that about two percent of these termina-

tions involved lump sums which were unavailable for reasons outside the recipient's control.

15. Shirley Yunker, Dakota County supervisor estimated that about one percent of all case terminations were due to lump sum receipt. She could recall no terminations involving lump sums which were unavailable for reasons outside the recipient's control.

16. Based on these estimates, I project that, throughout the state, there may be up to 10 or 12 cases terminated after July 30, 1983 which involve lump sums which were unavailable to recipients for reasons beyond the recipient's control.

FURTHER AFFIANT SAYETH NOT.

LINDA ADY

Date: 7th day of September, 1984.

[Jurat omitted in printing]

AFFIDAVIT OF LINDA ADY

[Caption omitted in printing]

LINDA ADY, being duly sworn, states as follows:

1. I am employed by the Minnesota Department of Human Services as the Supervisor of Policy Development, Assistance Payments Division. In my position as Supervisor of Policy Development, I analyze, recommend and implement state policies for AFDC and other welfare assistance programs. I have, since 1978, also supervised the interpretation of AFDC program policy to county financial workers and their supervisors, and have at times conducted training sessions for them.

2. The AFDC program in Minnesota is supervised by the Department of Human Services and locally administered by the state's eighty-seven counties.

3. As a matter of policy, the Department's position is, and has been, that clients should be fully informed of their rights,

responsibilities and options under the AFDC program. Through formal and informal instruction and policy interpretation to the counties, and at training sessions, the Department has emphasized the need to communicate with clients and to let them know what alternatives they have. The Department's policy is that clients should be given an oral explanation of the lump sum rule as soon as either a client reports the likelihood of a lump sum receipt or a client's circumstances indicate such a likelihood.

4. In May 1984, I instructed my staff to begin preparing a notice for general distribution on a number of AFDC program requirements. I spoke over the telephone with Richard Pavel, an attorney from the Legal Aid Society of Minneapolis, and explained that my unit had already begun to draft such a notice.

5. I spoke with Mr. Pavel again on July 26, 1984, at an AFDC rule advisory committee meeting and asked him if he had received a copy of the draft notice. He explained that he had received it, but had not had a chance to review it.

6. As far as I am aware, neither my staff nor I have heard anything further about the draft notice from Legal Aid.

7. The Department had agreed and was willing to proceed with a general notice similar to the draft notice attached to this Affidavit, prior to the Court's order in *Slaughter v. Levine v. Heckler*. However, I doubt that the notice is the most effective tool for informing AFDC clients of their rights and options under the program. In my experience, a general notice is not effective because clients are not apt to recall specific program rules unless they are directly affected by the rule.

8. I also have concerns about the Department's administrative capability to keep general notices up-to-date. Program

requirements are constantly in flux. Since my staff first drafted the program's general notice, AFDC program laws and rules have changed three times. In addition, a new state AFDC rule is in the process of being drafted. My fear is that requirements listed in the general notice will become obsolete during the six month periods between client eligibility redeterminations. I believe that clients may be worse off if they rely on misinformation than if they are on notice to make prompt inquiries of their financial worker.

9. At a minimum, it takes two to three months to draft, review, seek outside comment, print and distribute welfare program notices and other forms. This time period includes the time required to advertise and accept bids for printing required under state procurement laws. The cost to prepare, circulate for comment, print, and mail our proposed notice would be approximately \$33,500 annually, if it were provided to the entire caseload semiannually. With the frequency of changes in the AFDC law, it sometimes will be administratively impossible to keep recipients informed in writing of current program specifics.

10. If the Court finds that the Department has an obligation to provide recipients with a written notice on the lump sum rule which is more detailed than the draft notice attached to my affidavit, the Department proposes that this notice be distributed, on a selective basis, only to those clients who are likely to be affected by the rule, either because the client reports the likelihood of receipt of a lump sum or because the known circumstances of the client indicate such a likelihood. The Department further proposes that persons under these situations be offered an opportunity to receive a detailed, up-to-date, oral explanation of the lump sum rule.

Dated: December 20, 1984.

LINDA ADY

[Jurat omitted in printing]

AFFIDAVIT OF ROGER ZIMMERMAN

[Caption omitted in printing]

Roger Zimmerman declares as follows:

1. I am a Program Advisor for the State of Minnesota Department of Human Services Assistance Payments Division. As a part of my job duties, I analyze and develop policy and rules for income maintenance programs such as AFDC. I began this job with the Department of Human Services in May of 1984.

2. Prior to working for the Department of Human Services, I worked for Hennepin County for four years as a Unit Supervisor in the Economic Assistance Division. I was in charge of supervising financial workers in the AFDC program and implementing AFDC policies. I was also a financial worker for six years before I became a supervisor.

3. In May of 1984, I began to draft a notice for AFDC recipients explaining their rights and responsibilities in the program. I developed a draft notice, including an explanation of the lump sum rule, and requested Richard Pavel of Legal Aid Society of Minneapolis to comment on the draft.

4. I sent Mr. Pavel a copy of the draft toward the end of June. Before sending him the draft, I asked him to circulate the draft to other attorneys in his office.

5. On June 22, 1984, the Deficit Reduction Act of 1984 was enacted by Congress. This Act made substantial changes in the AFDC program affecting client eligibility. At that time, the Department of Human Services began revising its own AFDC rules.

6. In late July or early August, I attempted several times to call Mr. Pavel to ask him about his review of the notice. However, I was unable to reach him. Because I was unable to reach Mr. Pavel, I called Mary Grau, another attorney at

the Legal Aid Society of Minneapolis, to ask her whether she had seen the draft notice. She indicated that she had.

7. On September 10, 1984, the United States Department of Health and Human Services published its interim final rules implementing the Deficit Reduction Act. The Department's own AFDC rule was promulgated on November 6, 1984.

8. I currently am redrafting and reviewing the draft notice to ensure that it accurately reflects recent changes in the AFDC program. After I redraft the notice, I intend to re-circulate the notice to Legal Aid Society of Minneapolis and other advocacy groups for their comments.

9. While I was employed by Hennepin County, it was my practice to have my staff explain the lump sum policy whenever a client would inform them about the possibility of receiving a lump sum or when circumstances indicated that the client was likely to receive a lump sum. If a client reported that he or she anticipated a lump sum, my staff was instructed to provide the client with an explanation of the effects of and options under the lump sum rule.

10. In general, I encouraged my staff to discuss future contingencies with clients including the possibility of receiving a lump sum. If clients would raise the contingency with me, I would respond by explaining the lump sum formula and the options that a client had under the rule. For example, I would explain what types of income would be considered lump sums and explain that expenses incurred in securing the lump sum could be deducted. I also would explain to a client that he or she could request to have his or her AFDC case terminated prior to receiving the lump sum and thus avoid the rule's application.

11. Hennepin County had a general policy of orally explaining specific program requirements in detail and inform-

ing clients of all their options and alternatives under the program. About thirty percent of my time was spent communicating with my clients either by telephone, by mail or in face-to-face interviews.

12. In January of 1982, when the Omnibus Budget Reconciliation Act changes, including the lump sum rule, were communicated to the county by bulletin, the supervisors in our division spent two days meeting in a group to discuss these changes. A large amount of time was spent discussing how to communicate the new lump sum rule to clients and how to make sure that clients knew the ramifications of the rule.

13. In my experience as a financial worker and supervisor, I believe that a general notice of the lump sum rule or other specific program requirements will not be effective. Clients can only be expected to understand and remember information which is directly related to their present circumstances. Often times, I have had the experience of explaining program requirements generally to recipients and having them forget when the requirement became relevant to their circumstances.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: December 20, 1984.

ROGER ZIMMERMAN

[Jurat omitted in printing]

DECLARATION OF CONNIE FREED

[Caption omitted in printing]

CONNIE FREED declares as follows:

1. I am a Principle Financial Worker for Hennepin County and have been in this position since 1971. Prior to April, 1984, I handled a specialized case load of disabled AFDC clients. As a part of my job I process household income reports, make

eligibility redeterminations, review eligibility, and participate in public assistance appeals.

2. Since April of 1984 I have been employed in the Quality Assurance Unit of the Economic Assistance Division. As a part of my job duties there, I review cases to determine quality of service and review AFDC procedures.

3. I was Kathryn Jenkins' financial worker from November of 1982 through March of 1984.

4. She has been a recipient on and off since February 1, 1973 and resided at the same address continuously.

5. Between approximately December 24, 1981 and January 12, 1982, Kathryn Jenkins' husband received three lump sums totaling \$15,864.62. Her family was terminated from AFDC on March 1, 1982 because Mr. Jenkins had received excess monthly workers' compensation income. While she was off the program, on April 19, 1982, he received an additional \$11,499.34 lump sum.

6. According to my records Kathryn Jenkins and her family received a total of \$40,142.96 in income from various sources between December of 1981 and December, 1982. On November 3, 1982, Kathryn Jenkins reapplied for AFDC.

7. Our agency learned that Kathryn Jenkins' husband had received the lump sums in addition to the ongoing workers' compensation income when she reapplied for AFDC in November of 1982. The agency found out while determining routine eligibility on the reapplication. Neither Kathryn Jenkins nor her husband ever informed the county that they had received these lump sums.

8. Because of a court injunction in effect at that time, the county treated the 1981 and 1982 lump sums as a resource rather than income under the new lump sum rule.

9. On November 3, 1984, Kathryn Jenkins reported that she had received another lump sum amounting to \$5752. She

also told us that she had spent all of this money. She did not call me to inquire about the ramifications of spending all the lump sum before she spent it.

10. I do not recall whether I talked to Ms. Jenkins about the lump sum rule prior to her receipt of \$5,752 lump sum on October 31, 1983. However, my regular practice is to explain the lump sum rule to my clients as soon as I learn that they may receive a lump sum some time in the future. I explain the lump sum formula to them and give them an estimate of how long they can anticipate ineligibility for benefits. I explain that under the lump sum rule their lump sum income will be treated as available for them to use for their ordinary living expenses. I make them aware that if they pay off debts, buy new furniture or spend their lump sum in other ways, that they will not have that money available to live on for subsistence. If asked, I explain that they have the option to terminate AFDC benefits ahead of time to avoid the application of the lump sum rule. I also explain the difference in treatment of lump sums in the food stamps and Medical Assistance programs.

11. In my experience as a financial worker, the lump sum rule is difficult for clients to understand and that the most effective way of communicating the effect of the lump sum rule to clients is to sit down and talk with them about it. In my experience, recipients do not attach the same importance to routine information sheets or notices as they do information specifically geared to their situation. Like most of us, clients tend not to absorb or retain information when it is not directly relevant to their situation. I have discovered that the most effective notice is a person-to-person discussion of all possible ramifications of a specific program requirement at the time the requirement becomes relevant to the client's life.

12. I have often had the experience of explaining a general program requirement to a client and then explaining it over to them again when the requirement became pertinent. Often the client will have misunderstood or forgotten the general requirement in the first place. This is understandable because clients already receive so much technical information that the information becomes overwhelming. Clients receive monthly household income reports each month. They receive eligibility redetermination forms. They receive food stamp forms. Usually there is a general notice or reminder or list of resources inserted with AFDC checks sent each month. There are also pamphlets available to clients and an information packet is given to clients at application time.

13. I spend about twenty-five percent of my time communicating with clients, explaining various aspects of the program and what information is needed on forms. I regularly communicate with clients through telephone calls, speed memos, personal letters and personal interviews. I sometimes talk to the client's social worker or advocate to ensure that the client understands program requirements.

14. I try to anticipate which program requirements will affect my clients and explain those requirements as soon as possible to them.

15. It is the policy of Hennepin County to let clients know of the implications of all program requirements and let them know what their options and alternatives are so that clients can plan accordingly.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: December 20, 1984.

CONNIE FREED

[Jurat omitted in printing]

AFFIDAVIT OF JOHN PETRABORG

[Caption omitted in printing]

JOHN PETRABORG, being duly sworn, states as follows:

1. I am the Director of Quality Control and Corrective Action employed by the State of Minnesota Department of Human Services. I am responsible for collecting statistical data relating to AFDC cases, completing quality control reviews in the AFDC case load, identifying sources of error in the case load, and developing policies and procedures to correct those errors.

2. To accomplish these objectives, we select a random set of AFDC cases (approximately 1,920 a year) from throughout the state and recheck and/or verify every element of eligibility. This check is completed by reviewing the case record, speaking to the AFDC recipient, and contacting collateral sources of information.

3. We analyze the data collected in the quality control review to identify types of error, the causes of error, and trends, and then develop corrective policies.

4. This function is required by the United States Department of Health and Human Services. A sub-sample of our quality control sample is reviewed again by the Department of Health and Human Services to validate the error rate that the state has found to exist. If the error rate exceeds a three per cent tolerance level, the state is subject to a substantial fiscal sanction in the form of a decrease of federal financial participation in the state's AFDC program.

5. The Department of Human Services does not have any available data which would indicate with any certainty the average amount of lump sum income received by an AFDC recipient at any one time. However, in my experience, the most common type of lump sum income received by AFDC recipients is the Earned Income Tax Credit (EITC). The

EITC averages less than \$500 per recipient per year. The second most common type of lump sum income received by AFDC recipients is government benefit lump sum payments, such as Supplemental Security Income (SSI), Retirement, Survivors and Disability Income (RSDI), and worker's compensation awards. These are far less common than the EITC and average approximately \$1200 to \$1300 per recipient. The receipt of lump sums in excess of \$1300 is the exception.

FURTHER AFFIANT SAYETH NOT.

Dated: May 2, 1985.

JOHN PETRABORG

[Jurat omitted in printing]

AFFIDAVIT [OF SHELLEY SMITH-FLETCHER]

State of Minnesota

County of Winona—ss.

Shelley Smith-Fletcher, being first duly sworn upon oath, deposes and states:

1. My name is Shelley Smith-Fletcher.
2. I work as a paralegal for Southern Minnesota Regional Legal Services.
3. In the past six months, I have talked with at least five people who received lump sums while they were on AFDC.
4. These five people either spent some or most of their lump sums prior to knowing how the lump sum formula applied and that they would be ineligible for AFDC for a number of months.
5. I informed all of these people that if they had less than \$1,000 in resources, they would be eligible for General Assistance.
6. Most of the people I talked with were General Assistance eligible and felt they would need to apply for the program in

order to survive and pay bills until they were eligible for AFDC again.

Further affiant sayeth not.

SHELLEY SMITH-FLETCHER

Dated: May 14, 1985.

[Jurat omitted in printing]

AFFIDAVIT OF STEVEN C. MOON

[Caption omitted in printing]

State of Minnesota

County of Ramsey—ss.

STEVEN C. MOON, being first duly sworn, hereby deposes and states:

1. I am a staff attorney with the Saint Paul office of Southern Minnesota Regional Legal Services, Inc. (SMRLS). I have been employed by SMRLS since August of 1982.
2. Since May of 1983, our office has represented twenty-one (21) families who had their Aid to Families with Dependent Children (AFDC) benefits terminated pursuant to the "lump-sum income rule", 42 U.S.C. § 602(a)(17).
3. Of these twenty-one (21) families, ten (10) families were forced to apply and did, in fact, obtain family General Assistance benefits, because they had exhausted their lump-sum funds before the end of their period of ineligibility.

FURTHER AFFIANT SAYETH NAUGHT.

STEVEN C. MOON

Dated: May 15, 1985.

[Jurat omitted in printing]

PETITIONER'S BRIEF

(9)
No. 86-978

Supreme Court, U.S.
FILED

AUG 31 1987

JOSEPH E. SPANIOL, JR.
CLERK

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1987

**SANDRA GARDEBRING, Commissioner of the
Minnesota Department of Human Services,**
Petitioner,

vs.

KATHRYN JENKINS,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

BRIEF FOR THE PETITIONER

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August, 1987

QUESTIONS PRESENTED

1. Does 45 C.F.R. § 206.10(a)(2)(i) require a state to provide advance individual written notice detailing the mechanics and effect of the Aid to Families with Dependent Children "lump-sum" statute to all applicants and recipients upon enactment of the statute, at the time of application, and periodically thereafter?

2. Does a program publicity rule promulgated by the Secretary of Health and Human Services delay the implementation of a statutory AFDC change if the state fails to give AFDC recipients advance notice of the change, where Congress specified the effective date of the law and neither made its implementation dependant on advance notice of the change nor gave the federal agency authority to delay the effective date?

LIST OF PARTIES

The parties to the proceeding below:

(a) Respondent Kathryn Jenkins and three other persons, Sharon Slaughter, Helen Stewart and Jennifer Ayers, were plaintiffs in the district court. The court of appeals noted that the latter three were no longer parties in the court of appeals, although their names continued in the caption. Pet. App. A7.

(b) Leonard W. Levine, formerly Commissioner of the Minnesota Department of Human Services, was the defendant in the district court and both appellant and appellee before the circuit court. He has since resigned that office, and was replaced by Petitioner Sandra Gardebring.

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IN THE
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OCTOBER TERM, 1987

No. 86-978

SANDRA GARDEBRING, Commissioner of the
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vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 801 F.2d 288, and is reprinted at Pet. App. A1. The memorandum opinions of the district court are reported and reprinted as follows: 598 F. Supp. 1035, Pet. App. A27; 605 F. Supp. 1242, Pet. App. A61; 621 F. Supp. 509, Pet. App. A83; and unreported opinion dated June 13, 1985, Pet. App. A79.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1986. Pet. App. A95. The petition for certiorari was filed on December 9, 1986. Certiorari was granted on June 15, 1987. Jurisdiction of the Supreme Court is conferred by 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

45 C.F.R. § 206.10(a)(2)(i) (1986)

(i) Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program, and related services available, and the rights and responsibilities of applicants for and recipients of assistance. Specifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity.

Federal Statutes

Relevant provisions of the federal AFDC statute, at 42 U.S.C. § 602(a) and the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 *et seq.*, are set forth in the appendix to this brief.

STATEMENT OF THE CASE

This class action challenges the sufficiency of advance notice provided by the Minnesota Department of Human Services ("State") before implementing the 1981 "lump-sum" statute, 42 U.S.C. § 602(a)(17) (Supp. III 1985). Congress enacted the lump-sum statute as part of the Aid to Families with Dependant Children ("AFDC") program. On September 10, 1986, the Eighth Circuit Court of Appeals affirmed the district court's decision that 45 C.F.R. § 206.10(a)(2)(i) (1986) requires the State to give AFDC recipients advance notice of the lump-sum statute and that the State had failed to give adequate notice under that regulation. The circuit court upheld the lower court's order requiring the State to give detailed periodic notice of the lump-sum statute to AFDC applicants and recipients. The court of appeals also held that the State should be enjoined from applying the lump-sum statute to the named plaintiff, Kathryn Jenkins, even though she indisputably fell within the terms of the statute.

1. AFDC Program.

AFDC is a federal-state public assistance program established under Title IV-A of the Social Security Act, 42 U.S.C. §§ 601-15 (1982 & Supp. III 1985). The AFDC program provides financial assistance and other services to needy children and the parents or relatives with whom they live. *Id.* at § 601.

The AFDC program is based on a scheme of "cooperative federalism." *King v. Smith*, 392 U.S. 309, 316 (1968). States are not required to participate in the program. However, those which do participate receive matching federal funds for payments made to needy children and families. As a condition of receipt of these federal funds, participating states are required to administer their AFDC programs in compliance

with federal statutes and regulations promulgated by the Secretary of the federal Department of Health and Human Services ("Secretary" or "HHS"). *Id.*; 42 U.S.C. §§ 601 and 604 (1982), and 602 (Supp. III 1985).

Minnesota, like every other state, has chosen to participate in the AFDC program. Within the limits of the federal program, Minnesota has established liberal payment standards and elected optional coverages to provide a high level of benefits to Minnesota recipients. *Johnson v. Likins*, 568 F.2d 79, 82 (8th Cir. 1977).¹

2. Lump-Sum Statute.

Under the AFDC program, a family is not eligible for AFDC benefits if the family's "income" or "resources" during a particular month exceeds limits which are established by the State. 42 U.S.C. § 602(a)(7)(B), (17), and (18) (Supp. III 1985). Before 1981, an amount received during a particular month was treated as income only during that month; to the extent that the family retained all or part of the amount during subsequent months, it was treated as a resource in those months. *Lukhard v. Reed*, — U.S. —, 107 S. Ct. 1807, 1810 (1987) (plurality op.). Under this

¹ By virtually every measure, the benefits provided by Minnesota are among the highest in the nation. Minnesota's grant payment levels for most family sizes are in the top five among the states. Office of Family Assistance, Automated State AFDC Plans, Reports Based on State Plan Amendments Effective on or Before April 1, 1986 and Received by July 1, 1986 (Report Nos. 35-38). Minnesota has also been liberal in choosing options available under federal law to benefit Minnesota AFDC recipients. *See id.*, generally. In addition, AFDC families are automatically eligible for medical coverage under the Medicaid program, 42 U.S.C. §§ 1396-1396p (1982 & Supp. III 1985). *Id.* at § 1396a(a)(10)(A)(i)(I) (Supp. III 1985); Minn. Stat. § 256B.06, subd. 1(3) (1986). No state provides more comprehensive health care under the Medicaid program than Minnesota. Health Care Financing Administration, Medicaid Services State by State (Oct. 1, 1985).

policy, if an AFDC family received a large lump-sum payment (such as a retroactive Social Security payment, workers' compensation award or tax refund) which exceeded the family's monthly income limit, the family would be ineligible for AFDC during the month of receipt. However, if the family spent the lump-sum money before the beginning of the next month, so that the family's resources did not exceed the program resource limit, the family would again be eligible for AFDC. This policy had the unfortunate result of encouraging the family to spend the lump sum immediately in order to maintain AFDC eligibility, rather than to budget the amount carefully over as long a period as possible. *Id.*

The Omnibus Budget Reconciliation Act of 1981 ("OBRA") included various amendments and cutbacks in federally funded programs, including the AFDC program. Pub. L. No. 97-35, 95 Stat. 357. In enacting OBRA, Congress acknowledged the deficiencies in the treatment of lump sums under the AFDC program and amended the statute to address the problem. *See* Pub. L. No. 97-35, § 2304, 95 Stat. 845 (codified at 42 U.S.C. § 602(a)(17) (Supp. III 1985)).² Under the

² The Senate Report on the bill described the problem and Congress' solution:

Present law.—Any payments that meet the definition of income—for example, retroactive social security benefits—are counted as income in the month of receipt and any of the payment that is not spent in that month is usually considered as a resource in the months thereafter.

Committee amendment.—The committee believes that lump-sum payments should be considered available to meet the ongoing needs of an AFDC family. The present treatment of such payments has the perverse effect of encouraging the family to spend such income as quickly as possible in order to retain AFDC eligibility. The committee amendment would require that such income received in a month be considered available as income in the month it is received and also in future months. S. Rep. No. 139, 97th Cong., 1st Sess. 3, reprinted in 1981 U.S. Code Cong. & Ad. News 396, 771.

statute, a family which receives an amount of income in a month which exceeds the family's AFDC "standard of need" is rendered ineligible for as many months as that income would last if the family spent an amount equal to the standard of need each month. Depending on the amount of the lump sum, the recipient may be ineligible for several months.³

OBRA was enacted on August 13, 1981. The act specified that the new lump-sum statute and other AFDC changes would become effective on October 1, 1981, unless state law changes were required in a particular state to comply with the federal statutory changes. If such state law changes were required, then the AFDC changes would become effective in that state beginning with the first month after the close of the state's next legislative session. Pub. L. No. 97-35, § 2351 (a) and (b), 95 Stat. 859-60. *See* Br. App. A2, *infra*.⁴

³ For the text of the lump-sum statute, as amended, *see* page Br. App. A1, *infra*. The statute was amended in 1984 to give states the option to shorten the ineligibility period if the funds become unavailable for reasons beyond the recipient's control, if the funds are used to pay medical bills or if the state's standard of need increases. Pub. L. No. 98-369, § 2632(a), 98 Stat. 494, 1141 (1984). Minnesota adopted these changes in its next legislative session. 1985 Minn. Laws ch. 252, § 15 (codified at Minn. Stat. § 256.78 (1986)).

(The citation "Br. App. —" refers to the appendix printed as part of this brief. "Pet. App. —" refers to the appendix to the Petition for Writ of Certiorari filed with the Court. "Jt. App. —" refers to the Joint Appendix.)

⁴ The Secretary promptly promulgated a regulation to implement the lump-sum statute. *See* 46 Fed. Reg. 46,750, 46,763-64 (1981). The regulation was initially codified at 45 C.F.R. § 233.20(a)(3)(ii)(D). It was later amended and recodified at 45 C.F.R. § 233.20(a)(3)(ii)(F) (1986). *See* 49 Fed. Reg. 35,586, 35,600 (1984).

3. Implementation of Lump-Sum Statute in Minnesota.

Minnesota determined that the lump-sum statute and various other federal changes were required to be implemented in Minnesota on October 1, 1981. The State identified other changes which could not be made until after the next legislative session. For these changes, implementation was delayed. Pet. App. A97, A110.

On September 18, 1981, soon after the enactment of OBRA, the State sent a two-page letter ("OBRA Informational Letter") to all AFDC recipients summarizing 19 major changes to be made in the AFDC program. Pet. App. A97-A101. The letter stated, both at its beginning and at its end, that the letter was not intended as a detailed explanation of the changes and that recipients should contact their financial workers for more complete information. The first change described in the letter was the lump-sum statute:

Lump Sum Money: When a family receives lump-sum money such as an inheritance, a Social Security back payment, insurance settlement, gift, etc., the money will be deducted from the AFDC grant, whether or not it has already been spent. If the lump-sum added to other family income totals more than the AFDC maximum for that size family, the family will be ineligible for that month in which the lump-sum was received (and possibly for a number of following months), whether or not the money is spent before the period of ineligibility has gone by. If the family already received an AFDC grant that month, the grant would be "recouped" by the welfare agency.

Pet. App. A97-A98.

The letter was informational only; it was not used to terminate or reduce a recipient's benefits. If a recipient's benefits were later terminated based on the lump-sum statute, the recipient received a separate notice of adverse action complying with 45 C.F.R. § 205.10(a)(4)(i) (1986). Jt. App. A109. The State sent the letter to assist current recipients, even though the State did not (and does not) believe there was any legal requirement to provide such notice.⁵

Totally apart from any information about statutory changes, the State regularly provides to AFDC applicants pamphlets which describe the general scope, rights and requirements of AFDC and other public assistance programs. Jt. App. A29 and A31. Because the lump-sum statute affects only a small percentage of AFDC recipients in Minnesota (estimated at one to five percent, *id.* at A113-14) the State did not include a description of the lump-sum statute in these materials prior to this litigation. However, each applicant and recipient is assigned to a financial worker who provides specific information about AFDC eligibility requirements as they may apply to the individual. *Id.* at A117-22. In addition, a detailed AFDC program manual is available to the public in every local welfare office. 45 C.F.R. § 205.70 (1986).

⁵ The State implemented the lump-sum statute as planned on October 1, 1981. In August, 1982, in another suit, a federal court determined that conforming state-law changes were required and therefore the lump-sum statute should not have been implemented in Minnesota until February 1, 1982, the first month after Minnesota's next legislative session after October 1, 1981. See *Minnesota Recipients Alliance v. Noot*, No. 4-81 Civ. 658 (D. Minn., Aug. 9, 1982). The State then directed county agencies to notify and restore benefits to persons who had lost AFDC eligibility because of lump sums received between October 1, 1981 and January 31, 1982. Br. App. A2-5.

4. Commencement of This Action.

On July 7, 1983, a class of AFDC recipients whose benefits had been reduced or terminated under the lump-sum policy brought this lawsuit seeking declaratory and injunctive relief. The original plaintiffs challenged the validity of the federal lump-sum statute and the Secretary's implementation of it on constitutional and statutory grounds. The plaintiffs also challenged the adequacy of advance notice of the lump-sum statute given by the State, but only on due process grounds. Complaint, 8-9.

The State filed a third-party complaint against the Secretary on August 1, 1983. Jt. App. A3. The State challenged some aspects of the Secretary's application of the lump-sum statute and also sought to bind the Secretary to contribute the federal matching share of any benefit payments ordered in the suit.

Respondent Kathryn Jenkins intervened in the suit on September 7, 1984, more than a year after the initiation of the suit. Jt. App. A14. Jenkins' husband had received a retroactive Social Security disability payment of \$5,752 in October, 1983. *Id.* at A108. Within two days after receiving it, Jenkins and her family spent almost the entire lump sum on bills and clothing. *Id.* She then contacted her financial worker who explained the application of the lump-sum provision, and that Jenkins' family would be ineligible for AFDC for a number of months. *Id.*

In her complaint in intervention, Jenkins claimed that she had spent her lump-sum funds before receiving adequate advance notice of the effects of the lump-sum statute. She asserted that the failure to provide her with more specific notice violated 45 C.F.R. § 206.10(a)(2)(i) (1986). The plaintiffs conceded, and the lower court found, that Jenkins was the only named plaintiff with standing to assert the "notice" issue. Pet. App. A7, A63.

Kathryn Jenkins had been a recipient under the AFDC program in September, 1981, Jt. App. A95, and therefore was sent the OBRA Informational Letter.⁶ Then, in December, 1981 and January, 1982, while continuing to receive AFDC benefits, Jenkins' family received almost \$16,000 in workers' compensation lump-sum payments. Despite having recently received the OBRA Informational Letter, Jenkins did not report these lump-sum payments to her financial worker. *Id.* at A120. Moreover, on their monthly income reports filed with the county AFDC agency, Jenkins and her husband specifically stated that they had not received any "Lump Sum Payments/Settlements" or "Worker's Compensation" during December or January. *Id.* at A61.

The affidavits produced by plaintiffs show that it is the general practice of AFDC recipients to promptly contact their financial workers when events as significant as the receipt of lump-sum income occur. Jt. App. A103 and A106; Affidavit of Jennifer M. Ayers at 2. In fact, despite her failure to do so here, even Respondent Jenkins stated that it was her practice to call her financial worker promptly to report the receipt of any income. Jt. App. A110.

5. District Court's Ruling.

On December 11, 1984, the District Court granted plaintiff's motion for class certification, and granted partial summary judgment for the plaintiffs. Pet. App. A27. The court upheld the validity of the lump-sum statute and the Secretary's regulation against plaintiffs' constitutional and statutory challenges. However, the court adopted the plaintiffs'

⁶ Although Jenkins stated that she did not recall receiving the September 18, 1981 letter, Jt. App. A111, her counsel concedes that she "presumably" received the letter, since she was a recipient at that time. Respondent's Brief in Opposition to Petition for Writ of Certiorari at 6.

argument that, in implementing the lump-sum statute in Minnesota, the State had failed to comply with the notice requirements of 45 C.F.R. § 206.10(a)(2)(i). Pet. App. A47-51.⁷

The district court ordered two forms of relief. First, the court ordered the State to distribute a notice containing a "thorough explanation of the mechanics" of the lump-sum policy to all applicants and recipients at application and every six-months when eligibility is redetermined. Pet. App. A57. (The court later specifically instructed that the notice include examples of the statute's operation. Jt. App. A51.) Second, the court ordered the State to prepare a notice similar to the notice upheld in *Quern v. Jordan*, 440 U.S. 332 (1979), informing the class members that they could apply to the State for retroactive benefits. Pet. App. A57. In addition, the court ordered HHS to pay the federal share of any corrective payments resulting from the court's ruling. *Id.* at A70-73.

The State appealed the orders to the Eighth Circuit Court of Appeals. HHS also appealed from the district court's order regarding payment of the federal share, but later dropped the appeal. Pet. App. at A7, n. 8.

The plaintiff class subsequently moved the district court for an order declaring that class members who spent their lump-sum income before they were informed of the lump-sum policy were entitled to retroactive benefits. Respondent Jenkins requested an order enjoining the State from recouping benefits paid to her during her lump-sum ineligibility period.⁸ The dis-

⁷ The text of the regulation is set forth at page 2, *supra*.

⁸ Jenkins had appealed from the county's action to terminate benefits, and continued to receive benefits pending the resolution of the appeal, according to 45 C.F.R. § 205.10(a)(6)(i) (1986). When her appeal was resolved against her, the county notified her that it intended to recoup the benefits paid during the appeal. Jt. App. A77. The agency began to recoup the overpayment to Jenkins by reducing her monthly AFDC grant by one percent. Pet. App. A89; Minn. Stat. § 256.73, subd. 6 (1986).

district court denied the plaintiffs' motion for supplemental relief on November 5, 1985. Pet. App. A83. The court held that the relief sought by the plaintiff class and by Jenkins individually was precluded under the eleventh amendment as retroactive monetary relief against a state. Jenkins appealed this order to the court of appeals, and the appeal was consolidated with the State's appeal.

6. Ruling by Court of Appeals.

A divided panel of the Eighth Circuit Court of Appeals affirmed the district court's ruling that the State had not provided adequate advance notice of the lump-sum statute under 45 C.F.R. § 206.10(a)(2)(i). Pet. App. A1. The circuit court reversed the district court's November 5, 1985 decision and enjoined the State from recouping Respondent Jenkins' overpayment.

Regarding the notice issue, the majority rejected the State's argument that section 206.10(a)(2)(i) applies only to applicants and requires states only to provide general information about the availability of the AFDC program. Pet. App. A9. The court held that it was "crucial" that AFDC recipients receive advance notice of the change in policy regarding lump sums, and held that section 206.10(a)(2)(i) requires such notice. Pet. App. A10, A12. Moreover, the court rejected the State's argument that it is sufficient to have a financial worker available to each recipient to discuss the lump-sum statute when a recipient advises that a lump sum is anticipated or has been received. *Id.* at A12. Finally, the court determined that the September, 1981 OBRA Informational Letter did not provide sufficient notice concerning the changed lump-sum policy, because only persons who were recipients in September, 1981 had received the notice and

because the notice was, the court believed, "incomplete and confusing." *Id.* at A14-15. The court asserted that the letter "did not adequately explain the mechanics of the lump-sum rule and their inflexible operation." *Id.* at A15. The court also noted that the September, 1981 letter may have been confusing because, while it announced an effective date of October 1, 1981 for the lump-sum provision, the new statute was not actually implemented in Minnesota until February 1, 1982. *Id.* at A16.⁹

On the overpayment issue, the court of appeals overturned the district court's decision that it would violate the eleventh amendment to enjoin the State's recoupment of amounts paid to Respondent Jenkins. Pet. App. A22.¹⁰ The court also rejected the State's argument that, irrespective of whether adequate notice was given to Jenkins concerning the lump-sum statute, she was required to repay the amounts received because they exceeded the amounts to which she was entitled under federal eligibility requirements. The majority held that Jenkins was entitled to receive the benefits "because the defendant, having failed to provide adequate notice to Jenkins of the lump-sum rule, cannot properly invoke it against her. By failing to comply with the notice regulation, [the State] failed to institute a legal change in its eligibility rules." Pet. App. A21.

⁹ In this regard, the court of appeals was operating under the mistaken impression that the lump-sum rule was not actually implemented on October 1, 1981. It was implemented on that date. See note 5, *supra*. The notice later sent to persons declared ineligible because of receipt of lump sums between October 1, 1981 and January 31, 1982, made it clear that the reprieve applied only to lump sums received during that four-month period. Br. App. A4-5.

¹⁰ The State does not ask this Court to review the eleventh amendment determination.

Judge Fagg dissented from the court's opinion, Pet. App. A23-25, asserting that the court's result "is contrary to the expressed intent of Congress." *Id.* at A23. Judge Fagg noted that Congress had mandated that the lump-sum statute was to take effect in Minnesota on February 1, 1982 (*see* note 5, *supra*), and that Congress had not provided that the statute must be preceded by advance notice in order to be effective. *Id.* at A24. He stated that the majority of the court "seizes upon a regulation of the Secretary" in order to defeat the effective date expressly prescribed by Congress. *Id.* Finally, Judge Fagg said that the majority misinterpreted section 206.10(a)(2)(i). He said the regulation "simply requires the State to publicize generally in written form, and orally as appropriate, the AFDC program and its availability." *Id.*

SUMMARY OF ARGUMENT

1. The decision of the court of appeals creates notice requirements which are mandated neither by due process nor by federal statutes or regulations. The decision requires the State to provide recipients detailed advance notice of Congress' action in changing the lump-sum statute. This Court has rejected the argument that due process requires such notice, holding that welfare recipients have no greater right to advance notice of a legislative change than do any other citizens. *Atkins v. Parker*, 472 U.S. 115, 130 (1985).

Apparently because of *Atkins*, the circuit court did not base its decision on due process. Rather, it relied on a federal regulation, 45 C.F.R. § 206.10(a)(2)(i), as a basis for imposing notice requirements on the State. However, it is evident that this regulation does not support the lower court's decision.

In this case, Minnesota provided advance written notice of the 1981 lump-sum change to persons who were AFDC recipients at the time of the change. In addition, local agencies provided oral information to applicants and recipients based on their individual situations. The circuit court held that section 206.10(a)(2)(i) (1986) requires the State to provide advance and continuing written notice to applicants and recipients containing a detailed explanation of the mechanics of the lump-sum statute, and that the State's written and oral notices were not sufficient. This interpretation flies in the face of the language of section 206.10(a)(2)(i) and interferes with the authority of the State to administer the AFDC program.

The regulation requires only that information be provided to applicants, and not to recipients. It directs that "[a]pplicants shall be informed about the eligibility requirements and their rights and obligations under the program." *Id.* Thus, to the extent that the lower court ordered the State to provide advance notice of law changes to current recipients, and ordered that notice of the lump-sum statute be provided to recipients periodically, the decision obviously exceeds the requirements of the regulation.

Moreover, the federal regulation does not require that detailed information about specific eligibility rules be provided in written program materials. No state could possibly include detailed descriptions of all AFDC eligibility requirements in its pamphlets provided to applicants. In the views of Judge Fagg (dissenting below) and the Secretary, "the regulation simply requires the State to publicize generally in written form, and orally as appropriate, the AFDC program and its availability." Pet. App. A24.

The lower court's decision does not derive from the federal constitution, statutes or regulations, but instead inappropriately springs from the court's own conceptions of fairness and proper administration of the AFDC program. This Court has frequently admonished the lower courts not to impose their "notions of proper procedures upon agencies entrusted with substantive functions." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978).

The harm resulting from the lower court's decision is apparent. Under the circuit court's application of the notice regulation, states cannot predict which eligibility requirements might later be determined by a court to be so critical that detailed notice is required. States cannot guess when or in what form a court might think that notice should have been given, or whether a court might find a particular notice adequate. The difficulty created by the decision below arises not so much from the specific requirements imposed by the court in this case, but from a state's inability to *anticipate* what future notice requirements might be imposed. By imposing such notice requirements, and by subjecting the states to the constant threat of judicial second guessing concerning the adequacy of their notices, the lower court's decision threatens the ability of Minnesota and other states throughout the country to implement a multitude of rapidly changing laws governing eligibility for AFDC and other federal-state public assistance programs.¹¹

2. The decision of the court of appeals that the State could not implement the lump-sum statute until it had given

¹¹ Section 206.10(a)(2)(i) applies not only to AFDC, but also to Old Age Assistance, Aid to the Blind, Aid to the Disabled and Supplemental Security Income.

notice of the law change countermands Congress' mandate in two respects. First, Congress directed that the lump-sum statute would become effective in Minnesota on February 1, 1982, without any indication that the effective date would be subject to notice by the State. By holding that the statute could not be implemented until the State gave additional notices as directed by the court, the court frustrated the process of democratic decisionmaking.

In addition, Congress' statute specifically required the State to recoup from any recipient any amount received which exceeded the amount to which the recipient was entitled under Congress' eligibility standards. By prohibiting the State from recouping the amount Respondent Jenkins received while ineligible, the court again nullified the directive of Congress.

Absent constitutional limitations, courts must apply the statutes as written by Congress. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). A party subject to the statutory provisions is not relieved of the statutory requirements even if the responsible agency has failed to fully publicize statutory requirements and conditions. *Lyng v. Payne*, — U.S. —, 106 S. Ct. 2333 (1986).

ARGUMENT

I. THE FEDERAL REGULATION DOES NOT REQUIRE THE STATE TO PROVIDE ADVANCE WRITTEN NOTICE TO AFDC APPLICANTS AND RECIPIENTS CONCERNING THE MECHANICS AND EFFECTS OF THE LUMP-SUM STATUTE.

A. 45 C.F.R. § 206.10(a)(2)(i) Requires Only That The State Provide General Information To Applicants About The AFDC Program.

The decision below, that the State must give detailed advance and continuing notice providing a thorough explanation of the mechanics of the lump-sum statute to both recipients and applicants, finds no support in 45 C.F.R. § 206.10(a)(2)(i). In determining the intent of a law, this Court necessarily looks first to the language of the law itself. *Heckler v. Turner*, 470 U.S. 184, 193 (1985). The language of the regulation in question provides:

Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program, and related services available, and the rights and responsibilities of applicants for and recipients of assistance. Specifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity.

45 C.F.R. § 206.10(a)(2)(i) (1986) (emphasis added). The lower court's decision misconstrues the rule in two significant ways. The first relates to the class of persons to whom infor-

mation must be provided; the second relates to the type of information which must be disclosed.

First, section 206.10(a)(2)(i) does not mandate notice of any kind to AFDC recipients; by its express terms, the regulation only requires that information be provided to applicants. The first sentence plainly identifies those whom the rule is intended to benefit: "*Applicants* shall be informed . . ." The balance of the paragraph explains the nature of the information to be provided.

The circuit court's decision transforms the regulation into a vehicle for requiring that advance and periodic notice of statutory changes be provided to current recipients. In affirming the order of the district court, the circuit court's decision requires that a written notice concerning the lump-sum statute be provided to persons who were recipients at the time of the district court order, and that the notice be repeated to all recipients at least every six months. Pet. App. A57. By mandating notice to recipients, the decision below clearly exceeds any requirement of section 206.10(a)(2)(i).

A later provision of section 206.10 dispels any notion that the term "applicant" is used other than in its normal sense:

"Applicant" is a person who has, directly, or through his authorized representative, or where incompetent or incapacitated, through someone acting responsibly for him, made application for public assistance from the agency administering the program, and whose application has not been terminated.

45 C.F.R. § 206.10(b)(1) (1986). In fact, the terms "applicant" and "recipient" are distinguished within section 206.10(a)(2)(i) itself. The regulation requires that applicants must be informed about the "rights and responsibilities of applicants for and recipients of assistance." Thus, the reference to

recipients demonstrates that the Secretary was cognizant of the distinction between applicants and recipients when adopting the rule.

Furthermore, the history of section 206.10(a)(2)(i) confirms that the Secretary intended the provision to apply only to applicants. The regulation was first adopted in 1971, with little explanation. The first sentence was virtually identical to the first sentence of the current regulation: "Applicants will be informed about the eligibility requirements and their rights and obligations under the program." 36 Fed. Reg. 3,860, 3,861 (1971). In 1978, the Secretary amended the regulation in response to "reports from recipient group representatives that some State and local agencies have not made printed or oral information about the public assistance programs available to persons unless they are applicants as defined in 45 C.F.R. 206.10(b)(1)." 43 Fed. Reg. 6,949 (1978). The amendment changed the first sentence of the regulation to read: "Applicants and all individuals who inquire about the program shall be informed about the eligibility requirements and the rights and obligations of individuals under the program." *Id.* at 6,951 (emphasis added). Thus, the 1978 rulemaking proceeding demonstrates that the Secretary recognized that the regulation previously applied only to applicants. The Secretary expanded its coverage to only one additional class of persons: "all individuals who inquire about the program." In a rulemaking proceeding the next year, the language added in 1978 was deleted without explanation, so that the regulation once again provided only that "[a]pplicants shall be informed . . ." 44 Fed. Reg. 17,940, 17,943 (1979).

It is therefore clear, both from the language of the regulation and its history, that the regulation is intended to require states to provide information only to applicants. By holding

that the regulation requires notice to recipients, the lower court attempted to turn the regulation into something it is not—a requirement of notice to recipients of statutory changes.

The lower court's second misconstruction of the section 206.10(a)(2)(i) is equally serious. Under the supposed authority of this regulation, the circuit court affirmed the district court's order that the State provide written notices containing "a thorough explanation of the mechanics of the [lump-sum] rule." Pet. App. A57. The State was specifically directed to include in the notice examples of the application of the lump-sum statute. Jt. App. A51.

The lower court's decision creates requirements that simply are not contained in the regulation itself. The regulation does not require that any specific eligibility requirement be described in the State's written publicity materials, and does not require that any explanation be given in the detail mandated by the lower court. The purpose of section 206.10(a)(2)(i) is not to require a detailed description of all AFDC eligibility requirements, but instead to provide an overview of the program requirements which will be helpful to applicants in deciding whether to apply for AFDC and in understanding their rights as applicants. As Judge Fagg stated in his dissent below, the federal regulation "simply requires the State to publicize generally in written form, and orally as appropriate, the AFDC program and its availability." Pet. App. A24.

Section 206.10(a)(2)(i) requires that "[s]pecifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms [be] publicized and available in quantity." The pamphlets envisioned by the regulation could not possibly describe in detail (or even generally) all of the eligibility requirements of the

AFDC program. There are myriad eligibility requirements spread over many pages of federal and state regulations. These requirements are subject to frequent change as legislative policy shifts at both the federal and state levels.¹²

A separate regulation, 45 C.F.R. § 205.70 (1986), does address the State's responsibility to make detailed written information regarding eligibility requirements available to applicants, recipients and other persons. That regulation requires that program manuals and regulations regarding eligibility be made available to recipients, but only at each local welfare office.

Thus, the scheme of the federal regulations is that general information concerning the program will be provided in written form to all applicants, and more detailed information will be available by consulting with financial workers and by reviewing program materials at local agency offices. Neither section 206.10(a)(2)(i) nor section 205.70 requires that notice of legislative changes be individually provided to recipients.

The Secretary concurs with the interpretation of section 206.10(a)(2)(i) proposed by the State and adopted by Judge Fagg. Brief for the United States as Amicus Curiae (with respect to Petition for Writ of Certiorari, hereinafter "U.S. Brief") at 13. In the view of the Secretary, section 206.10(a)(2)(i) does not require the states to provide either applicants or recipients with advance written notice of the mechanics and operation of any AFDC program rule. *Id.* at 13, 16.

This court has often recognized "the established proposition that an agency's construction of its own regulation is

¹² For example, 45 C.F.R. pt. 233, containing eligibility requirements for AFDC, covers 40 pages of the Code of Federal Regulations. Minnesota's recently revised AFDC rule spans 66 pages in Minnesota's codified rules. Minn. Rules pt. 9500.2000 *et seq.* (1987).

entitled to substantial deference." *Lyng v. Payne*, — U.S. —, 106 S. Ct. 2333, 2341-42 (1986). *See also Lukhard v. Reed*, — U.S. —, 107 S. Ct. 1807, 1813-14, 1815 (plurality op.) (substantial deference owed to Secretary's conclusion that state's regulations are consistent with HHS's regulations) and *id.* at 1816 (Blackmun, J., concurring).

The pamphlets provided by the State clearly satisfy the requirements of section 206.10(a)(2)(i) and, more importantly, provide the information which will be most helpful to AFDC applicants. *See* Jt. App. A29 and A31. Rather than attempting to describe all AFDC eligibility conditions in detail, which would be likely to overwhelm even the most earnest of readers, Minnesota's AFDC pamphlets provide a general description of those eligibility requirements which form the framework of the AFDC program: that the assistance unit must include a child or children, that the support of the parents must be unavailable for one of the reasons specified, that there are limitations on gross income, net income, and resources, and that there are requirements concerning work registration and cooperation in recovery of child support.

The pamphlets also explain, as they must under the regulation, matters other than eligibility requirements—coverage, scope of the program, related services available, rights and responsibilities of applicants and recipients, and appeals. And, of course, the pamphlets explain that they are not comprehensive. They tell applicants, "The information in this brochure will help you to decide if you wish to apply for AFDC, but it is not intended to cover all program rules." Instead, the pamphlets advise, "You are urged to contact your welfare office for specific information as to the eligibility rules and limitations for AFDC. Since these can and do change from time to time, you should inquire with your welfare office for up-to-date information." Jt. App. A29.

By furnishing the AFDC pamphlets to applicants and by providing financial workers to give individualized advice and information, Minnesota fully meets the requirements of section 206.10(a)(2)(i) to provide applicants "information in written form and orally as appropriate." The circuit court's holding that the regulation requires detailed written notice of a single eligibility requirement affecting only one to five percent of the AFDC case load is simply not supported by the language of the regulation and would be impossible to implement on a general basis.

B. Even If The Federal Regulation Required That Recipients Be Given Notice Of The New Lump-Sum Statute, The State's September, 1981 Letter Adequately Provided That Notice.

The lower court determined not only that 45 C.F.R. § 206.10(a)(2)(i) requires advance written notice of the lump-sum statute, but also that the content of the State's OBRA Informational Letter did not adequately provide the required notice. This second determination was necessary in order for the plaintiffs to prevail, since Respondent Jenkins, whose claims are by definition typical of the class (Fed. R. Civ. P. 23(a)), had received the State's September, 1981 OBRA Informational Letter describing the lump-sum statute. In concluding that the OBRA Informational Letter was not adequate, the court read unreasonable and non-existent requirements into section 206.10(a)(2)(i) and improperly substituted its judgment for that of the administrators of the AFDC program.

The OBRA Informational Letter provided the following explanation of the change in treatment of lump sums:

Lump Sum Money: When a family receives lump-sum money such as an inheritance, a Social Security back payment, insurance settlement, gift, etc., the money will be deducted from the AFDC grant, whether or not it has already been spent. If the lump-sum added to other family income totals more than the AFDC maximum for that size family, the family will be ineligible for that month in which the lump-sum was received (and possibly for a number of following months), whether or not the money is spent before the period of ineligibility has gone by. If the family already received an AFDC grant that month, the grant would be "recouped" by the welfare agency.

Pet. App. A97-98.

Viewed fairly, the informational letter contained considerable detail concerning the new lump-sum statute. It gave examples of lump-sum income, it informed recipients that the money would be deducted from the AFDC grant whether or not it had already been spent, and it informed recipients that they would become ineligible for the month in which they received the lump-sum and could become ineligible for several months. Moreover, the introductory language of the letter informed recipients that the lump-sum provision was an "important change" from the prior practice. Pet. App. A97. And finally, the letter told recipients that it did not contain all the details: "*Please note: This letter is not intended as a detailed explanation of all the changes; you must get that from your financial worker.*" Pet. App. A97 (emphasis in original).

Therefore, even if section 206.10(a)(2)(i) required the State to give notice of the changed lump-sum provision to recipients, the State's letter was obviously sufficient. Certainly nothing in the regulation requires a "thorough expla-

nation of the mechanics" of the lump-sum statute, nor does anything in the regulation require that "examples of its application" be given.

It must be remembered that OBRA was enacted on August 13, 1981. Most of its provisions were to take effect on October 1, 1981, a month and a half later. With little time to act, and not believing it was required by law to do so, Minnesota nonetheless prepared and distributed the OBRA Informational Letter to its entire AFDC caseload, more than 50,000 households. Jt. App. A112. The notice highlighted 19 different OBRA changes. The State had neither the luxury of time nor the benefit of hindsight to dissect the paragraph dealing with only one of those 19 changes to determine whether it should have been more detailed.

The issue is not whether the State provided the best possible notice, but whether more notice was required under section 206.10(a)(2)(i). Clearly, nothing in the regulation requires more or better notice than the State provided.

C. The Lower Court Exceeded Proper Judicial Bounds In Imposing Its Own Notions Of The Appropriate Administration Of The AFDC Program.

It is evident from the opinions of both the district court and the court of appeals that they adopted their strained reading of the federal notice regulation because they believed that "fairness" required that AFDC recipients be provided individual notice of the federal lump-sum statute before it could be applied to them. The district court was critical of the lump-sum statute itself, calling it "admittedly harsh," and stating that "the wisdom or justice of the policy behind the lump-sum statute is questionable." Pet. App. A46. The court found that it would be "grossly unfair" and a "glaring in-

equity" to apply the lump-sum statute to a recipient without providing individualized advance notice. *Id.* at A48, A49. Without individual notice, the district court said, a recipient would "be totally unable to anticipate the strict budgeting requirements of the new rule." *Id.* at A49. The court of appeals similarly found it "crucial that AFDC recipients receive some form of advance notice of the changed policy" and that to impose the policy without such advance notice would be "truly Kafkaesque." *Id.* at A10, A11.

The State agrees that it was in the best interests of an AFDC recipient to know about the lump-sum provision before spending lump-sum funds. Although there are other public assistance benefits available to a family determined ineligible for AFDC under the lump-sum statute, these benefits were not as high as AFDC benefits during the time at issue here.¹³

The State determined that the purpose of informing recipients about the lump-sum rule when it affected them was best accomplished in two ways: first, by distributing the OBRA Informational Letter to provide general information to persons who were then recipients and, second, by providing financial workers who can answer questions for applicants and recipients about lump-sum income and other changes in a recipient's financial or family circumstances. The State, as well as county financial workers, believed that such an approach

¹³ Once the lump sum was spent, such a family would be eligible for subsistence payments under Minnesota's general assistance program, Minn. Stat. ch. 256D (1986 and Supp. 1987), medical care under the Medicaid program, Minn. Stat. ch. 256B (1986 and Supp. 1987), and assistance in purchasing food under the Food Stamp program, 7 U.S.C. 2011, *et seq.* (1982 and Supp. III 1985). Since 1986, the payment standards for families under the general assistance program in Minnesota have been the same as those for AFDC. Before 1986, the general assistance payment standards were lower. Minn. Stat. § 256D.01, subd. 1a (1986); 1985 Minn. Laws, 1st Spec. Sess., ch. 9, art. 2, §§ 55 and 105.

was superior to deluging applicants and recipients with detailed written notices about numerous eligibility requirements. Jt. App. A115, A119, A121-22.

Whether routine written notices, as a supplement to the procedure just described, would have been a good idea is a decision for AFDC program administrators to make. Unless authorized by constitution, statute or regulation, the courts may not overturn the policy decisions of administrators. "What judges may consider common sense, sound policy, or good administration, however, is not the standard by which we must evaluate the claim that the notice violated the applicable regulations." *Atkins v. Parker*, 472 U.S. 115, 127, n. 29 (1985). "[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of public interest are not judicial ones: 'Our Constitution vests such responsibility in the political branches.'" *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984) (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

Furthermore, this Court has previously rejected the premises relied upon by the court below in holding that the lump-sum statute could not be applied without advance individual notice to applicants and recipients. In *Atkins v. Parker*, 472 U.S. 115 (1985), the state had provided a general notice to food-stamp recipients that their benefits would be terminated or reduced as a result of one of the OBRA amendments. The plaintiffs challenged the sufficiency of the notices under the due process clause and the federal food-stamp statute and regulations. They claimed that each recipient was entitled to receive a personalized notice specifying the exact application of the statutory change to that recipient.

This Court held that the state's notice met the statutory and regulatory requirements, and that the state's action did not violate due process. Because the changes were simply a result of a statutory change enacted by Congress, rather than a factual determination by the state agency, due process required no notice at all. The Court said, "The participants in the food-stamp program had no greater right to advance notice of the legislative change . . . than did any other voters," and "[a]ll citizens are presumptively charged with knowledge of the law." 472 U.S. at 130. Even if a notice were required, the Court said, the general notice given by Massachusetts was sufficient:

Surely congress can presume that such a notice relative to a matter as important as a change in a household's food-stamp allotment would prompt an appropriate inquiry if it is not fully understood. The entire structure of our democratic government rests on the premise that the individual is capable of informing himself about the particular policies that affect his destiny. To contend that this notice was constitutionally insufficient is to reject that premise.

Id. at 131 (footnote omitted).

The principles of *Atkins* apply with even greater force here. Unlike *Atkins*, this case does not concern the notice sent to recipients informing them that their benefits will be terminated or reduced. There is no dispute in this case that, when the State actually reduced or terminated the recipient's benefits based on the lump-sum statute, it provided an adequate notice of the reasons for the action and the right to hearing under *Goldberg v. Kelly*, 397 U.S. 254 (1970). Instead, this case concerns only advance warning of the legislative change itself.

There was no suggestion by any of the nine justices in *Atkins* that advance notice of the legislative change, as opposed to an adverse action against a recipient, was required. Thus, Justice Brennan in a dissenting opinion argued that the notice required by due process was not notice of the legislative change, but notice of the state's action reducing benefits: "[T]he action of which notice was required was, it bears repeating, *not* Congress' decision to change the law but rather the Department's application of the changed law to individual recipients." 472 U.S. at 153 (Brennan dissenting) (footnote omitted, emphasis in original). This case is the converse of that described by Justice Brennan. In this case, the plaintiffs alleged only that the State gave inadequate notice of Congress' decision to change the law, and do not challenge the adequacy of the notice given before termination or reduction of benefits.

Atkins clearly establishes that due process does not require notice in a case such as this.¹⁴ As Judge Fagg noted, Respondent Jenkins had ample time to become familiar with Congress' statutory change in the two years between its passage and her receipt of the lump sum in question. Pet. App. A23-24. In addition, the State's OBRA Informational Letter certainly should have prompted Jenkins to make appropriate inquiries, even if she were not otherwise inclined to do so.

Furthermore, even though the circuit court's decision did not rest on due process grounds, the principles relied upon by the court below directly contradict those espoused by this Court in *Atkins*. In striking contrast to the principle of *Atkins*

¹⁴ At least two other courts have rejected the argument that due process entitles a recipient to advance notice of the lump-sum rule. See *Jackson v. Guissinger*, 589 F. Supp. 1288, 1294 (W.D. La. 1984); *Rivera v. Illinois Dept. of Public Aid*, 132 Ill. App. 3d 213, 476 N.E.2d 1143 (1985).

that a recipient may be expected to inquire about the effect of the law, the lower court based its strained and erroneous interpretation of the regulation on the assumption that it is unfair to expect an AFDC recipient who receives a large sum of money to inquire about the effect of that receipt on his or her eligibility before spending the money.

Instead of objectively analyzing the language of the regulation, the lower court seized on the regulation as a means to grant relief from a legislative policy the court considered harsh. The court simply imposed upon the State the court's own notions of the proper administration of the AFDC program.

For example, because the notice requirements imposed by the circuit court were not based on the regulation, the court was required to invent limitations on the notice requirements. The court apparently recognized that the State cannot possibly include in its general written notices detailed descriptions of all AFDC eligibility requirements. Consequently, the court hinted at a limiting principle—the State must provide advance written notice to AFDC recipients and applicants "of the lump-sum rule, a rule which requires advance notice to achieve its underlying purpose and which can have drastic consequences for those to whom it is applied." Pet. App. A14. To the extent that this is intended to be a limiting principle, it is not found anywhere in the language of section 206.10(a) (2) (i). Instead, it is the court's own creation.¹⁵

In addition, the court below disregarded the views of AFDC administrators and financial workers concerning the most effective way to communicate eligibility information to re-

¹⁵ Moreover, the proffered principle will not actually limit the impact of the court's decision to the lump-sum statute. See pages 34-35, *infra*.

cipients, and instead imposed the court's own views. The court's interpretation of the regulation is based on the premise that written notice is better notice. However, in the opinion of state and local agency administrators and financial workers, face-to-face oral explanations of technical AFDC regulations communicate information more effectively than routine written notices. Jt. App. A118-19, A121-22. Most people are not apt either to absorb or remember specific program requirements unless they become directly affected by those requirements. There is no reason to assume that recipients are any different. *Id.* at A115, A119, A121. This is particularly true where recipients are already overwhelmed with written forms and notices. *Id.* at A122. Moreover, face-to-face discussions of regulations are more likely to clear up misunderstandings or pick up on crucial facts about the recipient's particular situation. *Id.* at A121-22.

After the distribution of the OBRA Informational Letter, neither the State nor county agencies provided ongoing written information to AFDC recipients concerning the lump-sum statute, which affected only a small percentage of the program's participants. Jt. App. A115, A118-19. Instead, financial workers provided an oral explanation of the lump-sum statute to a recipient as soon as the recipient reported the likelihood of a lump-sum receipt or the recipient's circumstances indicated that the receipt of a lump-sum was likely. *Id.* at A115, A118, A121.

The Secretary has specifically concurred with the State's judgment about the appropriateness of oral notice:

[T]he Secretary has determined that information is most effectively conveyed by face-to-face communications between program participants and caseworkers and that, except for general information requirements, the cost

of advance written notices concerning the operation and effects of particular AFDC rules is too high to justify requiring all states to send them.

U.S. Brief at 15. The Secretary has made the sensible determination that the benefit of "flooding recipients with notices about every program change" is questionable, and that "recipients will be more likely to rely on their caseworkers to inform them of how their eligibility for benefits has been affected by any particular change in circumstance." *Id.* at 17.¹⁶

The lower court here failed to "respect legitimate policy choices" of the State's AFDC program administrators, *Chevron*, 467 U.S. at 866, and instead substituted its own notions of "common sense, sound policy, or good administration." *Atkins*, 472 U.S. at 127, n. 29. If policy decisions are to be made regarding what specific statutory changes and eligibility conditions must be described to applicants and recipients, and in what manner, that decision should be made by Congress or by the federal agency, where administrative expertise and public input can be brought to bear. This Court has cautioned lower courts "against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978).

¹⁶ The facts of this case show that written notice of specific program requirements is of limited value. Kathryn Jenkins received the September, 1981 letter highlighting the lump-sum statute and other OBRA changes. Just three months later, she received substantial lump-sum payments, but failed to report them to the county, even on periodic reports specifically requesting that information. Jenkins later said she did not recall receiving the September, 1981 letter or the AFDC pamphlets. Jt. App. A96, A111.

D. States Cannot Effectively Administer The AFDC Program In Accordance With The Lower Court's Ruling.

Neither Minnesota nor any other state can administer the AFDC program in a manner which is fully consistent with the circuit court's decision. To require the State to repeatedly provide the detailed notice describing the mechanics of *only* the lump-sum provision may not be impractical. However, the premise of the lower court's decision—that the State has an obligation to give all recipients individual written notice detailing specific AFDC eligibility requirements that may affect only a few recipients—reaches far beyond the lump-sum statute. As noted above, there are numerous AFDC eligibility requirements, constantly changing, spread over many pages of federal and state statutes and regulations. The lump-sum statute was only one of 19 OBRA changes described in the State's OBRA Informational Letter. The precedent established by the circuit court's decision could require the State to provide an AFDC "program operations manual," containing a description of the operation and effect of all AFDC eligibility requirements, complete with examples, to every recipient and applicant at least every six months, and additionally whenever any eligibility provision changes.

As described above, the circuit court attempted to justify its far-reaching decision by characterizing the lump-sum policy as having "drastic consequences." Pet. App. 14. The court noted that a recipient may plan for the effects of the policy if he or she understands its operation at the time the lump-sum payment is received. Pet. App. A10-II. But the lump-sum rule shares this "planning" element with many other eligibility requirements. For example, if an eighteen-year old drops out of school, the child (and perhaps the caretaker as well) will become ineligible. 45 C.F.R. § 233.90(b)

(3) (1986). If a recipient marries, the new stepparent's income is presumed available to the rest of the family and may result in the family's ineligibility. 45 C.F.R. § 233.20(a)(3)(xiv) (1986). If a parent gives a daughter a car worth more than \$1,500, she and her children will lose eligibility even if she tries to give it back. 45 C.F.R. § 233.20(a)(3)(i)(B)(2) (1986). If a recipient works more than 100 hours two months in a row, or turns down a job, or participates in a strike, the family may become ineligible. 45 C.F.R. § 233.100(a) (1986). As with the lump-sum provision, the adverse impact of each of these eligibility requirements can be avoided through advance planning. How will the State anticipate which requirements a court might later find to have "drastic consequences"?

Furthermore, the decision below fails to articulate any standards for judging the adequacy of advance notice. It can always be argued, after the fact, that notice could have been better. Under the precedent established by the lower court's decision, every notice will be a potential basis for litigation. Administrative agencies charged with the task of promptly implementing complex legislative policies will constantly face the unpredictable threat of reversal under "this vague injunction to employ the 'best' procedures." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546-47 (1978).

This unrestrained judicial second-guessing presents perhaps the most harmful consequence of the circuit court's decision. When combined with the court's remedy for inadequate notice—that the State's attempt to implement the policy is retroactively invalidated years after the fact (*see* Part II, below)—this hindsight frustrates the implementation of Congress' mandate. Despite the State's best efforts to comply with any applicable notice requirement, the court may later

find the notice too general and uninformative, or too detailed and complex to understand, and retroactively enjoin the State's implementation of the law.

This Court, therefore, should reverse the lower court's decision. That decision is without support in the language of 45 C.F.R. § 206.10(a)(2)(i) and is contrary to the principles of this Court's decisions. If allowed to stand, it will have severe effects on the implementation of AFDC and other federal-state benefit programs throughout the country.

II. THE LOWER COURT'S DECISION, THAT THE STATE COULD NOT IMPLEMENT THE LUMP-SUM STATUTE UNTIL IT HAD GIVEN NOTICE OF THE LAW CHANGE, CONTRADICTS THE DIRECT MANDATE OF CONGRESS.

The court of appeals enjoined the State from applying the lump-sum statute to Respondent Jenkins because the court concluded she had not been given adequate advance notice of the statute. This holding contradicts express Congressional directives in two respects. First, Congress clearly and affirmatively established the effective date of the lump-sum statute without any suggestion that it intended to condition that date on advance notice to recipients. Second, Congress mandated that a state recover from a recipient any overpayment of benefits, that is, any amount paid to the recipient which exceeds the amount the recipient should have received under federal eligibility standards. By holding that Minnesota did not legally implement the lump-sum change on February 1, 1982 and by enjoining the State from recouping Respondent Jenkins' overpayment, the court below improperly relied on its reading of an administrative regulation to defeat the clear policy decisions made by Congress.

In enacting OBRA in 1981, Congress intended to alter federal fiscal policies and to restrain federal spending "in order to wage an effective battle against the high inflation and unemployment which [had] plagued the national economy for many years." S. Rep. No. 139, 97th Cong., 1st Sess. 3, *reprinted in* 1981 U.S. Code Cong. & Ad. News 396, 398. In furtherance of this goal, OBRA substantially amended the AFDC statute in order to tighten eligibility requirements and reduce program expenditures. To achieve the intended cost savings, Congress mandated that the changes be implemented promptly. Thus, the required effective date for Minnesota was February 1, 1982. *See* note 5, *supra*.

Under the circuit court's decision, the lump-sum statute did not become effective in Minnesota on February 1, 1982 as directed by Congress, but instead became effective more than three years later. The court held that, "[b]y failing to comply with the notice regulation, DPW failed to institute a legal change in its eligibility rules." Pet. App. A21.

That the court of appeals nullified the effective date specified by Congress is clear. In his vigorous dissent from the lower court's decision, Judge Fagg said:

[E]ven accepting the court's conclusion that the regulation can be read to require advance written notice prior to implementation, such a reading is, in my view, inconsistent with Congress's express statement that the amendment "will become effective" in Minnesota on February 1, 1982. To that extent, the regulation cannot be enforced. Congress could itself have required advance written notice or left the implementation of the amendment entirely to the Secretary. It did not do so but rather specifically determined the date on which the amendment would become fully effective. We have no choice but to respect that decision.

Pet. App. A25.

Judge Fagg was clearly right. The decision of the majority interferes with Congress' ability to set eligibility limitations in the AFDC program. The circuit court lost sight of the fact that Congress determined that the eligibility requirements for AFDC would change in Minnesota on February 1, 1982. Absent constitutional mandate, neither Minnesota, nor the Secretary, nor the courts are authorized to countermand that determination.

In addition, the lower court ignored Congress' directive when it enjoined the State from recovering the overpayments made to Respondent Jenkins. As noted above, Jenkins appealed from the determination that she was ineligible because of her family's receipt of the lump-sum payment, and she continued to receive benefits pending the resolution of her administrative appeal. When that appeal was resolved against her, the agency notified her that the benefits would be recouped by reducing her current grant by one percent per month. Jt. App. A77; Pet. App. A88-A90, n. 4.

Not only had the OBRA amendments made Jenkins and persons like her ineligible for AFDC benefits, those amendments also directed that a state agency must recoup all overpayments made to ineligible recipients. 42 U.S.C. § 602(a)(22) (Supp. III 1985). Under the Secretary's regulations, an overpayment "means a financial assistance payment received by or for an assistance unit for the payment month which exceeds the amount for which that unit was eligible." 45 C.F.R. § 233.20 (a)(13)(i) (1986). Since a recipient who receives a lump-sum greater than AFDC income limits is ineligible for AFDC, benefits paid after that time constitute overpayments and must be recouped.

The court of appeals held that the State should be enjoined from recovering the overpayment because the State erred in failing to provide adequate notice of the lump-sum statute to

Jenkins. However, it is clear that overpayments (and underpayments) must be corrected whether they are a result of recipient error or agency error. 47 Fed. Reg. 5648, 5672 (1982). If the agency had erroneously calculated a recipient's benefit or misapplied the law and paid the recipient too much, the amount of the overpayment would be subject to recovery even if the recipient had already spent the money in complete good faith. The State attempts to minimize the adverse effect of recoupment on families by recouping only one percent or five percent of the family's grant each month, depending on whether the overpayment was due to the error of the recipient or the agency. Minn. Stat. § 256.73, subd. 6 (1986).

The policy of the AFDC program operates to insure that eligible recipients are paid the correct amount of their eligibility entitlement. *Jacquet v. Westerfield*, 569 F.2d 1339, 1344 (5th Cir. 1978); cf. *Foggs v. Block*, 722 F.2d 933, 941 (1st Cir. 1983), *rev'd on other grounds sub nom. Atkins v. Parker*, 472 U.S. 115 (1985). Because welfare funds are limited, failure to recoup overpayments will eventually diminish funds available for distribution to all welfare recipients. *Johnson v. Likins*, 568 F.2d 79, 85 (8th Cir. 1977). Moreover, failure to recover overpayments "would give overpaid recipients an unfair windfall when compared with other recipients." *Id.* (quoting *Steere v. State Dept. of Public Welfare*, 243 N.W.2d 112, 126 (Minn. 1976)).

The circuit court's decision produces just this result. Respondent Jenkins did not report the October 1983 lump sum to her financial worker until she had spent almost the entire amount. Under the circuit court's order, Jenkins is treated better than recipients who behaved more sensibly and did consult their financial workers before spending their lump sums. Plaintiff Helen Stewart is a case in point. When Stewart received a lump-sum payment, she immediately called her

financial worker, learned of the lump-sum statute, and attempted to budget the lump sum over the specified period. Jt. App. A103. Unlike Stewart and other recipients, Jenkins is allowed by the lower court's decision to use her lump-sum monies to pay debts and buy necessities for her family, and also have her AFDC grant for future expenses. Under this scheme, ignorance is bliss. Stewart is penalized for checking with her financial worker before spending her lump sum. Jenkins is rewarded for spending first and asking questions later. Under the circuit court's decision, recipients who claim they were unfamiliar with the rules fare better than those who stay informed.

Thus, the circuit court's injunction against recovery of the excess payments made to Jenkins directly contravened the statute enacted by Congress, as well as the Secretary's regulations. The net result of the lower courts' ruling is that Respondent Jenkins received benefits at a level exceeding that authorized by Congress.

The obligation of the courts to apply the laws as written by Congress could not be more clear. It is the "duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) ("the Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of any actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance"). This Court has recognized this principle repeatedly. See, e.g., *United States v. Locke*, 471 U.S. 84, 95 (1985) (judiciary not "licensed to attempt to soften the import of Congress' chosen words"); *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981) (court not authorized to overlook valid regulation).

In effect, the circuit court's order estopped the state from enforcing the lump-sum and overpayment statutes. However, the lower court's decision cannot be justified on a theory of equitable estoppel. This Court's opinions establish, without any doubt, that government may not be estopped based on a failure to fully publicize statutory requirements. *Lyng v. Payne*, — U.S. —, 106 S. Ct. 2333, 2340 (1986); *INS v. Hibi*, 414 U.S. 5, 8-9 (1973) (*per curiam*). In *Lyng*, this Court recognized in dicta that "it may well be that some of the same concerns that limit the application of equitable estoppel against the Government bear on the appropriateness of awarding other remedies that have a close substantive resemblance to an estoppel." 106 S. Ct. at 2340. One of those principles, the Court said, is that "an agency's power is no greater than that delegated to it by Congress." *Id.* at 2341.¹⁷ Thus, this Court in *Lyng* acknowledged, as it had many times earlier, that the courts cannot order that governmental benefits be provided in contravention of the limitations established by Congress.

To deny AFDC benefits to a recipient like Jenkins may appear harsh, since she claims she spent her entire lump sum before becoming aware that receipt of the lump sum would make her ineligible for a number of months. But, even if viewed solely in equitable terms, this result must be balanced against the inequity of paying Jenkins more benefits than she was entitled to receive and more than other recipients receive. The hardship on recipients like Jenkins is ameliorated in Minnesota by providing other public assistance programs as a safety net for families ineligible for AFDC because of

¹⁷ Since this Court determined in *Lyng* that the federal agency's notice was sufficient under the federal regulations, it was unnecessary for the Court to determine whether the remedy ordered by the lower court violated Congress' directive.

the lump-sum statute. *See supra* at note 13. Moreover, where the excess benefits have already been paid to the recipient (as in Jenkins' case), the harm is further minimized by limiting recoupment to only a small percentage of the recipient's grant.

The court of appeals cited *Buckhanon v. Percy*, 708 F.2d 1209 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984), and *Kimble v. Solomon*, 599 F.2d 599 (4th Cir.), *cert. denied*, 444 U.S. 950 (1979), for the proposition that, where the state has provided inadequate notice of changed standards, a court may order restoration of benefits under the previously governing standard. Pet. App. A22. We do not assume that these cases were correctly decided. However, even if they were, neither decision supports the remedy ordered by the court of appeals here.

Buckhanon concerned notices provided by the State of Wisconsin when it reduced or terminated benefits based on the OBRA amendments. The district court, applying a standard deriving from *Goldberg v. Kelly*, 397 U.S. 254 (1970), determined that the state's notices were not sufficient under the applicable federal regulations requiring individual notice of benefit reductions or terminations based on law changes. *Buckhanon v. Percy*, 533 F. Supp. 822, 832 (E.D. Wis. 1982). Thus, the district court and the court of appeals in *Buckhanon* ordered the restoration of benefits until a sufficient *pre-termination* or *pre-reduction* notice was provided to each recipient.

The purpose of the *Goldberg* requirement that a recipient's benefits may not be reduced or terminated until the recipient is provided with adequate prior notice and opportunity for hearing is "to protect a recipient against an erroneous termination of his benefits." 397 U.S. at 267. It is to protect the

interests of an "eligible recipient." *Id.* at 264, 266. Here, there is no question about whether Jenkins met the eligibility requirements established by Congress and effective in Minnesota on February 1, 1982. She did not. Moreover, she has already received the notice and the hearing required by *Goldberg*, and has been determined ineligible. Jt. App. A69.

Consequently, *Goldberg* does not require the type of notice ordered by the lower courts here, and reinstatement of benefits based on cases deriving from *Goldberg* is mistaken. The notice required by the lower court in this case is not a pre-termination or pre-reduction notice. Respondent Jenkins has never suggested that the state failed to provide her with an adequate pre-termination notice. The notice required by the lower courts here was only a notice of the change in the law.

Like *Buckhanon*, *Kimble v. Solomon* also involved a reduction in benefits and, consequently, is inapplicable here. In addition, though, *Kimble* is also inapplicable for a second reason. *Kimble* involved a reduction in Medicaid benefits by the Maryland legislature. It is true that a state (and even a state legislature) may be unable to effect changes in its federal-state public assistance program without complying with federal regulations. However, the Eighth Circuit's citation to *Kimble* for the proposition that, "by failing to comply with the notice regulation, [the State] failed to institute a legal change in its eligibility rules," misses the mark. Here it was Congress which changed the eligibility requirement. As Judge Fagg noted in dissent, Congress certainly is not foreclosed by any agency regulation from changing the requirements of the AFDC program and specifying a date on which those changes will take effect in a particular state.

It should also be noted that, even in the type of situation presented in *Buckhanon* and *Kimble*, where a recipient re-

ceives benefits pending proper notice and opportunity for hearing, the benefits paid are ultimately subject to recovery if it is determined that the recipient was not eligible to receive them. This is specifically provided by federal regulations, 45 C.F.R. §§ 205.10(a)(6) and 233.20(a)(13)(i) (1986), and was explicitly acknowledged by this Court in *Goldberg v. Kelly*, 397 U.S. at 266. See also *Edelman v. Jordan*, 414 U.S. 1301, 1302-03 (1973) (Rehnquist, J., circuit justice, granting stay). If a recipient has received benefits in an amount greater than the recipient's entitlement under the eligibility standards, that amount is subject to recovery. The court of appeals cited no authority for ignoring this basic principle.

The implications of the circuit court's holding, that the State cannot legally effectuate a congressionally mandated eligibility requirement if it fails to give recipients advance notice, are enormous. Those far-reaching effects are well illustrated by this case. Respondents, attempting to defeat or postpone Congress' 1981 public assistance program changes, attacked the adequacy of the State's pre-implementation notice more than a year after the statute's effective date in Minnesota. Three years after the implementation by the State, the federal court held that the advance notice was inadequate and therefore retroactively held that the lump-sum amendment was not effective on the date prescribed by Congress. Recipients may thus turn the notice issue into a weapon for delaying or defeating the implementation of countless legislative judgments about AFDC eligibility. If the court of appeals' order is allowed to stand, it will seriously disrupt the ability of states to implement changes in federal law in a timely, predictable and final manner, as well as the ability of Congress to dictate when and on what conditions changes are to be made.

CONCLUSION

Petitioner requests that this Court reverse the judgment of the court of appeals.
August, 1987.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

42 U.S.C. § 602(a)(17) and (22) (Supp. III 1985)

(a) Contents. A State plan for aid and services to needy families with children must—

...

(17) provide that if a child or relative applying for or receiving aid to families with dependent children, or any other person whose need the State considers when determining the income of a family, receives in any month an amount of earned or unearned income which, together with all other income for that month not excluded under paragraph (8), exceeds the State's standard of need applicable to the family of which he is a member—

(A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (8), divided by (ii) the standard of need applicable to such family, and (B) any income remaining (which amount is less than the applicable monthly standard) shall be treated as income received in the first month following the period of ineligibility specified in subparagraph (A);

...

(22) provide that the State agency will promptly take all necessary steps to correct any overpayment or underpayment of aid under the State plan, and, in the case of—

(A) an overpayment to the individual who is a current recipient of such aid (including a current recipient whose

overpayment occurred during a prior period of eligibility), recovery will be made by repayment by the individual or by reducing the amount of any future aid payable to the family of which he is a member[.]

Pub. L. No. 97-35, § 2351, 95 Stat. 859

(b) If a State agency administering a plan approved under part A of title IV of the Social Security Act demonstrates, to the satisfaction of the Secretary of Health and Human Services, that it cannot, by reason of State law, comply with the requirements of an amendment made by this chapter to which the effective date specified in subsection (a) applies, the Secretary may prescribe that, in the case of such State, the amendment will become effective beginning with the first month beginning after the close of the first session of such State's legislature ending on or after October 1, 1981. For purposes of the preceding sentence, the term "session of a State's legislature" includes any regular, special, budget, or other session of a state legislature.

[State Agency Letterhead]

INSTRUCTIONAL BULLETIN #82-92

October 26, 1982

TO: Chairperson, Board of County Commissioners

Attention: Director

Chairperson, Human Service Board

Attention: Director

SUBJECT: Court Action Affecting Lump Sum Provisions
Court Action

The Minnesota Recipients Alliance (MRA) brought a class action suit against DPW in December 1981 challenging the implementation of several policies contained in the 1981 Omnibus Budget Reconciliation Act (OBRA). On August 5, 1982,

a terminated recipient entered the suit as a Plaintiff-Intervenor seeking a preliminary injunction from DPW's implementation of the lump sum provisions contained in OBRA. The injunction was granted based on a court ruling that there was a conflict between state law and OBRA lump sum requirements between October 1, 1981 to January 31, 1982.

Identification of Class Members

Persons who were determined ineligible for AFDC at any time since October 1, 1981 due to a lump sum received between the dates of October 1, 1981 and January 31, 1982 are members of this class.

Persons who receive a lump sum *after* January 31, 1982 are *not* members of the class. Such persons are subject to the OBRA lump sum requirements where the amount of the lump sum divided by the standard of need results in a period of ineligibility.

NOTE: Local agencies are reminded that the lump sum provisions can only be applied to current recipients of AFDC at the time a lump sum is received.

Requirements of the Local Agency

Local agencies must identify those cases terminated from AFDC after October 1, 1981 due to a lump sum payment received between October 1, 1981 and January 31, 1982. As a case is identified, the local agency shall date and mail the attached "Notice to Class Members".

Class members must respond within 60 days of the mailing of the Notice to Class Members in order for their request to be considered by the local agency.

Upon receipt of the request for review, local agencies shall determine if and when eligibility existed subsequent to the AFDC termination. This determination must be made subject

to lump sum policies in effect immediately prior to October 1, 1981. After the determination is made, notice to the applicant or recipient must be made on DPW 1842. Corrective payments shall then be made, if appropriate, and current eligibility shall also be determined.

NOTE: Since the authority to implement OBRA lump sum policy has been delayed until February 1, 1982, any automatic periods of ineligibility assigned to class members during that period must be cancelled.

Opportunity to Appeal

Any class member aggrieved by the local agency decision regarding eligibility for a corrective payment or current eligibility may, of course, appeal according to normal procedures.

Questions regarding this bulletin should be addressed to:

Income Maintenance Policy Center
Client Eligibility Unit
Minnesota Department of Public Welfare
444 Lafayette Road—2nd Floor
St. Paul, Minnesota 55101

Sincerely,
ARTHUR E. NOOT
Commissioner

DATE: _____

NOTICE TO CLASS MEMBERS

The State of Minnesota has entered into an agreement in a case entitled *MRA vs. Noot* that could affect you. Families who had their entire AFDC grant terminated as a result of receiving a lump sum payment between October 1, 1981 and January 31, 1982 are entitled to request a corrective payment from their local welfare agency. You are one of the people

covered by the agreement in this case, and may be eligible for a corrective payment.

If you want your county welfare department to determine your eligibility for a corrective payment you must request the determination in writing within 60 days of the date of this notice. You can use the detachable form on the bottom of this page to make your request.

If you do request a corrective payment, the welfare department will evaluate your family's income and resources during the months in which you did not get any AFDC because of the lump sum payment you received.

The welfare department may ask you to provide information about your family's income and resources during this period. In order to have your eligibility for a corrective payment determined, you will have to cooperate in producing the requested documentation.

If the welfare department determines that you met AFDC eligibility requirements, you will receive a corrective payment.

TO: _____ County Welfare Board

My family's AFDC grant was terminated because of a lump sum payment I received between October 1, 1981 and January 31, 1982. Please determine my eligibility for a corrective payment. I understand that if my family met AFDC income and resource requirements during this period I will receive a corrective payment.

DATE: _____ SIGNED: _____

ADDRESS: _____ PHONE: _____

AMICUS CURIAE

BRIEF

①
No. 86-978

Supreme Court, U.S.
FILED

AUG 28 1987

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

SANDRA GARDEBRING, COMMISSIONER OF THE
MINNESOTA DEPARTMENT OF HUMAN
SERVICES, PETITIONER

v.

KATHRYN JENKINS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether 45 C.F.R. 206.10(a)(2)(i) requires a state to provide advance written notice to applicants for and recipients of benefits under the Aid to Families with Dependent Children program concerning the mechanics and effects of the so-called "lump-sum" rule of 42 U.S.C. (Supp. III) 602(a)(17).

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-978

SANDRA GARDEBRING, COMMISSIONER OF THE
MINNESOTA DEPARTMENT OF HUMAN
SERVICES, PETITIONER

v.

KATHRYN JENKINS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The Aid to Families With Dependent Children (AFDC) program is a cooperative federal-state assistance program which offers financial assistance to needy dependent children and the persons who care for them. States participating in the AFDC program have discretion to determine the amount of assistance provided, but the states must comply with requirements imposed by the Act and by the Secretary of Health and Human Services. 42 U.S.C. (Supp. III) 602(a). This case presents two questions involving the interpretation of the Secretary's

regulations: whether 45 C.F.R. 206.10(a)(2)(i) requires a state to provide advance written notice to applicants for and recipients of benefits under the AFDC program concerning the mechanics and effects of the so-called "lump-sum" rule of 42 U.S.C. (Supp. III) 602(a)(17); and whether the failure to provide advance written notice to such persons precludes a state from enforcing the statutory recoupment obligations of the AFDC. The Secretary has a substantial interest in ensuring that these questions are resolved in a manner that furthers the purposes of the AFDC program. At the Court's invitation, the United States filed an amicus brief at the petition stage of this case in which we argued that the decision below misconstrued the Secretary's regulations.

REGULATORY PROVISION INVOLVED

45 C.F.R. 206.10(a)(2)(i) provides as follows:

Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program, and related services available, and the rights and responsibilities of applicants for and recipients of assistance. Specifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity.

STATEMENT

1. The Aid to Families with Dependent Children program, Title IV of the Social Security Act, 42 U.S.C. (& Supp. III) 601 *et seq.*, establishes a cooperative federal-state assistance program. Partici-

pating states provide financial support to needy dependent children and the persons who care for them; in return, the federal government partially reimburses the states for the expenses they thereby incur. The goal of this undertaking is to "encourag[e] the care of dependent children in their own homes * * * and to help [those children's] parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection * * *." 42 U.S.C. 601; *Shea v. Vialpando*, 416 U.S. 251, 253 (1974).

States participate in the AFDC program at their option, and at present all states have chosen to do so. As a requirement of participation, each state must establish and administer an assistance plan that conforms with the requirements set forth in the statute and with the implementing rules and regulations promulgated by the Secretary of Health and Human Services. See 42 U.S.C. (Supp. III) 602(a); see generally 45 C.F.R. 201.0 *et seq.* These provisions require each state to establish a state-wide standard of need, "which is the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level." *Shea v. Vialpando*, 416 U.S. at 253. Each state also must specify "how much assistance will be given, that is, what 'level of benefits' will be paid." *Rosado v. Wyman*, 397 U.S. 397, 408 (1970). Furthermore, the state also must distinguish between a family's "resources" and its "income." If in a given month a family's "resources" or its "income" exceeds predetermined limits, which are set by the state subject to federally prescribed maximums, the family is ineligible to receive AFDC benefits for that month. See 42 U.S.C. (Supp. III) 602(a)(7)(B), (17), and (18); 45 C.F.R. 233.20(a)(3)(i)(B).

Prior to 1981, federal law required states to treat all "income" or "resources" received in one month as "resources" in succeeding months until the money was spent. See *Lukhard v. Reed*, No. 85-1358 (Apr. 22, 1987), slip op. 2 (plurality opinion). The application of this rule where a family received a non-recurring lump-sum payment, such as a gift or a retroactive Social Security payment, had an anomalous effect. Because the payment would usually increase the family's "income" above the prescribed limits in the month it was received, and threaten to increase its "resources" to disqualifying levels in succeeding months, this "treatment of [lump-sum] payments ha[d] the perverse effect of encouraging the family to spend such income as quickly as possible in order to retain AFDC eligibility." S. Rep. 97-139, 97th Cong., 1st Sess. 505 (1981) (Budget Committee Report). Thus, instead of promoting AFDC's goal of encouraging AFDC families to budget their money responsibly, this aspect of the law had the opposite effect.

To eliminate this anomaly, the Secretary recommended that Congress amend the statute's treatment of lump-sum receipts. *Lukhard v. Reed*, slip op. 2 (plurality opinion). Specifically, the Secretary proposed that lump-sum income be divided by the family's standard of need and that the family be ineligible for AFDC benefits for the resulting number of months. See *ibid.* Congress concurred in the Secretary's suggestion, and in August 1981 Congress enacted the Secretary's proposed "lump-sum" rule (and other proposed changes in the AFDC program) into law. See Section 2304 of the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 845 (codified at 42 U.S.C. (Supp. III)

602(a)(17)). Congress provided that the new lump-sum rule would "become effective on October 1, 1981," unless the Secretary determined that a state's law prohibited compliance with it, in which case the rule would "become effective * * * the first [state legislative session] ending on or after October 1, 1981." OBRA, § 2321, 95 Stat. 859-860.

2. Petitioner, the Commissioner of the Minnesota Department of Public Welfare,¹ then sent a letter to all current AFDC recipients in Minnesota informing them that changes would soon be implemented in the federal AFDC requirements (Pet. App. A97-A101). Included in these changes was the treatment of lump-sum payments. The letter stated that under the new law, such payments could render a family temporarily ineligible for AFDC benefits.² It also explained that it was "not intended as a detailed explanation of all the changes," that such explanation should be received "from your financial worker," and that the rule would become effective on October 1, 1981 (*id.* at A97-A98). Because of a separate piece

¹ At the time, Leonard Levine was the Commissioner of the Minnesota Department of Public Welfare. Petitioner Sandra Gardebring succeeded Mr. Levine.

² The letter explained (Pet. App. A97-A98) that, "[w]hen a family receives lump sum money such as an inheritance, a Social Security back payment, insurance settlement, gift, etc., the money will be deducted from the AFDC grant, whether or not it has already been spent. If the lump-sum added to other family income totals more than the AFDC maximum for that size family, the family will be ineligible for the month in which the lump sum was received (and possibly for a number of following months), whether or not the money is spent before the period of ineligibility has gone by. If the family already received an AFDC grant that month, the grant would be 'recouped' by the welfare agency."

of litigation, however, petitioner did not actually implement the new lump-sum rule until February 1, 1982 (*id.* at A4).

Respondent, the representative of a class of AFDC recipients in Minnesota who either had been or would be found ineligible for AFDC benefits because of the lump-sum rule,³ brought this class action against petitioner in July 1983 (Pet. App. A5). She alleged that the lump-sum rule violated the Social Security Act and the constitutional guarantees of equal protection and due process. Respondent also alleged that petitioner had not provided the plaintiff class with adequate advance notice of the mechanics and operation of the lump-sum rule (*ibid.*). Petitioner then filed a third-party complaint against the Secretary, demanding that the federal government bear a proportionate share of any liability that arose from its implementation of the lump-sum rule.

The district court certified the plaintiff class and granted it partial summary judgment (Pet. App. A5-A8, A27-A59, A61-A77, A79-A81, A83-A94). The court rejected the challenges based on the Social Security Act and the Equal Protection and Due Process Clauses (*id.* at A5-A6, A40-A47, A51-A57). It agreed, however, with the plaintiff class that, in implementing the lump-sum rule, petitioner had failed to provide the notice required by 45 C.F.R. 206.10 (a)(2)(i).⁴ The court found that petitioner "does

³ Two other AFDC recipients were putative class representatives when this suit was brought. Neither recipient, however, remains a party to this litigation (Pet. App. A7 n.7).

⁴ The regulation also applies to several other programs as they are enforced in the territories of the United States: the Old-Age Assistance (42 U.S.C. (& Supp. III) 301 *et seq.*), Aid to the Blind (42 U.S.C. (& Supp. III) 1201 *et seq.*), Aid to the

not advise AFDC applicants of the lump sum rule at the time they apply for benefits," that the "only information provided by [petitioner] to Minnesota AFDC recipients regarding the lump sum policy [was the] * * * September 18, 1981 [letter,]" that this letter "fell short of the requirement [of 45 C.F.R. 206.10(a)(2)(i)], that applicants are to be advised of 'conditions of ineligibility,'" that "[n]o class member who applied for AFDC benefits after September 18, 1981 has received *any* written notice of the lump sum policy," and that "recipients are sometimes not advised of the lump sum rule until [petitioner] sends them a termination of benefits notice" (Pet. App. A48 (emphasis in original)). The court held that the "lack of advance notice makes it essentially impossible for the majority of AFDC recipients to budget their lump sums according to the rigid formula imposed by [petitioner]" (*ibid.*).

As a remedy, the court ordered petitioner to prepare a "thorough explanation of the mechanics of the [lump-sum] rule[.]" to mail that explanation to "all current AFDC recipients," and to "include such an explanation [both] in the information which it provides to all individuals who apply for AFDC benefits" and "in the material that is given to recipients at the time of their periodic six-month reevaluation for benefits" (Pet. App. A57). In addition, the court ordered petitioner to notify those recipients whose benefits had been terminated because of the lump-

Permanently Disabled (42 U.S.C. (& Supp. III) 1351 *et seq.*), and Supplemental Security Income for the Aged, Blind, and Disabled programs (42 U.S.C. 1381 note). Otherwise, the regulation applies only to the AFDC program. Any implication in our brief at the petition stage that the regulation has a broader effect is erroneous.

sum rule that the terminations may have been improper and that, under state law, they could reapply for benefits (*ibid.*). But it refused to enjoin petitioner from seeking to recover, through a reduction in future payments, AFDC benefits that were paid to respondent during the pendency of her challenge to the lump-sum rule,⁵ on the ground that the Eleventh Amendment barred such relief (*id.* at A89-A90).

3. On appeal by both petitioner and respondent,⁶ a divided panel of the court of appeals affirmed in part and reversed in part (Pet. App. A1-A25). The majority agreed with the district court that petitioner had failed to comply with the requirements of 45 C.F.R. 206.10(a)(2)(i). But it disagreed with the district court's refusal to enjoin petitioner from seeking to recoup the overpayments made to respondent (Pet. App. A18-A22).

a. On the notice issue, the court of appeals rejected petitioner's argument that the requirements of 45 C.F.R. 206.10(a)(2)(i) are satisfied by "in-

⁵ Respondent had been found eligible for AFDC benefits in November 1982 (Pet. App. A88). On October 31, 1983, however, her husband received a disability payment of more than \$5,000, which the family immediately spent (*ibid.*). Respondent reported the lump sum receipt to her caseworker, who informed her that the lump sum receipt rendered her family ineligible for AFDC benefits for six months (*ibid.*). After respondent's administrative appeals were rejected, petitioner proposed to withhold one percent of her future monthly AFDC benefits until the overpayment was recovered (*id.* at A89).

⁶ The Secretary initially appealed the portion of the district court's order requiring him to pay the federal share of any benefits payable to the class, but subsequently withdrew that appeal (Pet. App. A7 & n.8).

forming an AFDC recipient of the lump-sum rule and its operation when the recipient reports receiving or appears likely to receive a lump sum" (Pet. App. A9). The court noted that "[t]he regulation on its face contemplates that in appropriate cases oral notice will be given as a supplement to written notice, not that it represents an alternative to written notice" (*ibid.*). Moreover, the court said, "[e]ven [if it were] true that oral notice may replace written notice in appropriate cases, * * * the oral notice provided by * * * [petitioner] cannot be considered 'appropriate' notice" (*id.* at A10). The court reasoned that, "[w]ithout advance notice, an AFDC beneficiary is unlikely to budget a lump sum according to the new rule's rigid formula" (*ibid.*), and that petitioner's "oral-notice policies do not reasonably assure that an AFDC recipient who gets a lump sum will have advance notice of the rule" (*id.* at A12). On the latter point, the court noted that "it is not always possible for the recipient or his or her caseworker to anticipate the receipt of a lump sum" and that "[e]ven a highly competent caseworker may wrongly determine that receipt of a lump-sum is not likely, forget to provide[] notice of the rule, or be tardy in doing so" (*ibid.*).

The court also rejected petitioner's argument that the September 18, 1981, letter satisfied the requirements of 45 C.F.R. 206.10(a)(2)(i) (Pet. App. A14-A16). The court noted that members of the plaintiff class who were not on the welfare rolls when the letter was transmitted did not receive it or any other written notice of the lump-sum rule, as required by the court's interpretation of 45 C.F.R. 206.10(a)(2)(i) (Pet. App. A14-A15). Moreover, the court found that the letter was "incomplete and confus-

ing' " (*id.* at A15), because it did not adequately explain the mechanics of the lump-sum rule and its "inflexible operation" (*ibid.*) and because the letter did not accurately report the effective date of the lump-sum rule (*id.* at A16).

Finally, the court rejected petitioner's argument that the district court could not enjoin the recoupment of overpayments made to respondent (Pet. App. A18-A22). The court held that an injunction against the recoupment would not violate the Eleventh Amendment. The court reasoned that, since petitioner had already paid respondent, the remedy would not amount to a retroactive award of damages against the state (*id.* at A19-A20). The court further held that federal regulations requiring the recovery of overpayments did not bar such an injunction. In the court's view, the payments to respondent could not be considered an "overpayment," because petitioner, having failed to provide adequate notice to respondent of the lump-sum rule, cannot properly invoke that rule against respondent. *Id.* at A21. "By failing to comply with the notice regulation," the court ruled, "[petitioner] failed to institute a legal change in its eligibility rules" (*ibid.*).

b. Judge Fagg dissented (Pet. App. A23-A25). He stressed that, under the express terms of the OBRA, the lump-sum rule became effective in Minnesota on February 1, 1982 (*id.* at A23), and that, "[c]onspicuously absent from the [enactment] was any suggestion that[,] in addition to this explicit effectiveness date[,] Congress intended to include the implicit qualification that the implementation of the amendment hinge[d] decisively on the state providing applicants and recipients alike with 'appropriate' advance written notice of the amendment's pending implementation" (*id.* at A24). Judge Fagg reasoned

that 45 C.F.R. 206.10(a)(2)(i) is a "regulation * * * of general applicability" that "was not adopted in direct response to the amendment" and that "does not mandate that implementation of congressionally adopted eligibility requirements be preceded by advance written notice" (Pet. App. A24). In his view, "the regulation simply requires the state to publicize generally in written form, and orally as appropriate, the AFDC program and its availability" (*ibid.*).

SUMMARY OF ARGUMENT

The Secretary has established a triparte scheme to provide AFDC beneficiaries with information concerning eligibility requirements and their rights and obligations under the AFDC program. When an individual first applies for AFDC benefits, the Secretary requires that he receive a written statement setting forth the general requirements of the AFDC program. The Secretary's regulations also require the states to establish a system whereby recipients can report events that may affect their eligibility to the state and have the opportunity to ask about the possible consequences of any event. Only if the state decides to terminate or reduce a recipient's benefits does the Secretary require that the individual receive a written notice explaining the action to be taken and the justification for such action. This information dissemination scheme represents a careful balance designed to provide needed information to AFDC applicants and recipients in a useful way while not imposing costly administrative burdens on the states.

The decision below changes the Secretary's scheme into one in which AFDC beneficiaries will receive numerous written communications describing some-

times intricate changes in the operation of the program that will often be of no immediate applicability to many of the recipients. This result stems from two errors in the court of appeals' analysis. First, the court misread the regulation, which applies only to applicants, and not to recipients. Second, even as to applicants, Section 206.10(a)(2)(i) requires only that persons be told generally about the program. The regulation does not require (and it does not forbid) that applicants be told about the mechanics of the lump-sum rule. The regulation leaves to the states the determination whether to provide various categories of information in written or oral form. That judgment rests on the Secretary's belief that the states may properly conclude that particular information—especially about future contingencies—can most effectively be conveyed by face-to-face communications between caseworkers and program participants.

ARGUMENT

THE SECRETARY'S REGULATION DOES NOT REQUIRE STATES TO PROVIDE DETAILED WRITTEN NOTICE OF THE OPERATION OF THE LUMP-SUM RULE TO AFDC BENEFICIARIES

1. Congress has authorized the Secretary to promulgate regulations to implement the AFDC program. 42 U.S.C. 1302. Pursuant to this authority, the Secretary has established a three-part scheme for disseminating information about the AFDC program. First, 45 C.F.R. 206.10(a)(2)(i) (emphasis added) provides that "[a]pplicants shall be informed about the eligibility requirements and their rights and obligations under the program." Under this provision, state agencies must provide applicants (see 45 C.F.R.

206.10(b)(1) (defining "applicant"))⁷ with information about the basic operation of the AFDC program. This obligation can be satisfied through the distribution of "bulletins and pamphlets" describing the general eligibility conditions of the AFDC program and the individual's duty to report the occurrence of events that may affect the amount of benefits to which he or she is entitled. See also 45 C.F.R. 206.10(a)(2)(iii) (applicants and recipients must be informed that information regarding eligibility and income will be sought from other agencies). Second, Section 206.10(a)(2)(ii) (emphasis added) provides that "[p]rocedures shall be adopted which are designed to assure that *recipients* make timely and accurate reports of any change in circumstances which may affect their eligibility or the amount of assistance." Under this provision, state agencies must make available procedures whereby individuals who are receiving AFDC benefits can report events that might affect their eligibility and seek counsel concerning the significance of those events. Finally, Section 205.10(a)(4) provides that, "[i]n cases of intended action to discontinue, terminate, suspend or reduce assistance * * *, [t]he State or local agency shall give timely and adequate notice," including "a written * * * statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, [and an] explanation of the individual's right to request an evidentiary hearing." Under this regulation, state agencies must provide individualized no-

⁷ 45 C.F.R. 206.10(b)(1) defines an "applicant" as "a person who has * * * made application for public assistance from the agency administering the program, and whose application has not been terminated."

tice and explanation to any person whose benefits are to be denied, reduced, or terminated.

The type of information that the regulation requires a state to provide an individual under the AFDC program therefore depends upon a person's status within the system. An applicant will be informed in writing and orally about the AFDC program and about his basic rights and obligations. A person who is already within the system, upon reporting a change in his circumstances, will be informed by his caseworker about the effect that the change will have upon his eligibility.* Finally, a person who is ruled ineligible to participate in the program, or whose benefits are stopped or reduced, is given a specific written explanation of the reasons for his ineligibility or for the termination or reduction in his benefits. The logic underlying this scheme is readily apparent. Deciding how to disseminate information to individuals in any welfare program necessarily involves the balancing of several considerations. Fairness requires that individuals be given some way to learn about the program and to comply with its requirements. At the same time, legislatures appropriate only limited funds for welfare programs; every dollar spent on administrative matters, such as dissemination of written information, reduces the money available for beneficiaries. Moreover, experience in administering these programs has suggested that complex advance

* Changes in numerous circumstances can affect a person's eligibility to participate in the AFDC program or the amount of benefits to which he is entitled. Among these circumstances are the age of the child and whether he is in school, the composition of the family unit (which can be affected by the remarriage of a parent, the birth of a new child, or the departure of an old child), and the employment status of a parent. See generally 45 C.F.R. Pt. 233.

written notice to beneficiaries may often be less effective than timely oral discussion as a means of usefully conveying information about contingencies that may affect benefit eligibility.⁹ Reconciling these in-

⁹ See J.A. 115-116 (affidavit of Linda Ady, Supervisor of Policy Development, Assistance Payments Division, Minnesota Department of Human Services) ("I doubt that the [written] notice [ordered by the district court in this case] is the most effective tool for informing AFDC clients of their rights and options under the program. In my experience, a general notice is not effective because clients are not apt to recall specific program rules until they are directly affected by the rule. * * * I also have concerns about the Department's administrative capability to keep notices up-to-date. Program requirements are constantly in flux. * * * I believe that clients may be worse off if they rely on misinformation than if they are on notice to make prompt inquiries of their financial worker."); *id.* at 119 (affidavit of Roger Zimmerman, Program Advisor for the State of Minnesota Department of Human Services Assistance Payments Division) ("In my experience as a financial worker and supervisor, I believe that a general notice of the lump sum rule or other specific program requirements will not be effective. Clients can only be expected to understand and remember information which is directly related to their present circumstances. Often times, I have had the experience of explaining program requirements generally to recipients and having them forget when the requirement became relevant to their circumstances."); *id.* at 121-122 (affidavit of Connie Freed, Principal Financial Worker for Hennepin County) ("In my experience as a financial worker, the lump sum rule is difficult for clients to understand and that the most effective way of communicating the effect of the lump-sum rule to clients is to sit down and talk with them about it. In my experience, recipients do not attach the same importance to routine information sheets or notices as they do information specifically geared to their situation. Like most of us, clients tend not to absorb or retain information when it is not directly relevant to their situation. I have discovered that the most effective notice is a person-to-person discussion of all possible ramifications of

terests and considerations is a difficult task for which there is no scientifically prescribed solution. The Secretary has established a scheme that allows states to provide information in a meaningful way at a reasonable cost. In doing so, the Secretary has been careful to preserve considerable flexibility for each state to determine how best to meet these requirements, and to decide whether additional means of disseminating information should be used.

Petitioner appears to have complied with the requirements of the Secretary's regulation.¹⁰ When an individual applies for AFDC benefits in Minnesota, petitioner provides the applicant with pamphlets and information packets describing the individual's basic rights and obligations under the AFDC program (see J.A. 29-31). Moreover, an individual receiving AFDC benefits in Minnesota is assigned to a caseworker who will "orally explain[] specific program requirements in detail and inform[] clients of all their options and alternatives under the program" (J.A. 118-119 (affidavit of Roger Zimmerman, Pro-

a specific program requirement at the time the requirement becomes relevant to the client's life. * * * I have often had the experience of explaining a general program requirement to a client and then explaining it over to them again when the requirement became pertinent. Often the client will have misunderstood or forgotten the general requirement in the first place. This is understandable because clients receive so much technical information that the information becomes overwhelming.").

¹⁰ The findings of the courts below do not establish the extent to which the individual members of the class certified by the district court received notice, written or oral, of the duty to inform a caseworker of changed circumstances. The affidavits submitted by petitioner, however, suggest that petitioner carried out that duty, and respondent does not appear to argue to the contrary.

gram Advisor for the State of Minnesota Department of Human Services Assistance Payments Division); see *id.* at 114-115 (affidavit of Linda Ady, Supervisor of Policy Development, Assistance Payments Division, Minnesota Department of Human Services); *id.* at 122 (affidavit of Connie Freed, Principal Financial Worker for Hennepin County)). Petitioner may also periodically provide written materials (such as the September 18, 1981, letter)¹¹ to AFDC recipients in Minnesota describing changes in the AFDC program and urging recipients to contact their caseworkers for additional information about those changes (Pet. App. A97-A101). Finally, whenever a person's benefits are to be terminated or reduced, petitioner sends the individual written notice describing the change and the reasons for it (Pet. 10 n.2). The Secretary's regulations require nothing more of petitioner.

2. The courts below therefore erred in concluding that petitioner was required to provide persons such as respondent with advance written notice of the operation of the lump-sum rule. First, the reasoning of the lower courts' opinions erroneously assumes that 45 C.F.R. 206.10(a)(2)(i) applies to recipients and applicants alike. See Pet. App. A12-A14, A48-A51. The text of the regulation, however, makes clear that it applies only to applicants, and the history of the regulation is consistent with that reading of its text.¹² Another regulation, 45 C.F.R. 206.10

¹¹ We do not mean to suggest that petitioner was required by the Secretary's regulations to send out this letter, or any other written material, to AFDC recipients. We merely note that the dissemination system that petitioner has described appears to comply with the Secretary's regulations.

¹² See 36 Fed. Reg. 3864 (1971); 43 Fed. Reg. 6949, 6950-6951 (1978); 44 Fed. Reg. 17943 (1979). The original version of what is now 45 C.F.R. 206.10(a)(2) referred only to

(a)(2)(ii), is the one that relates to disseminating additional information to recipients, who have previously received the information furnished to applicants.¹³ That provision, which is quoted in full at page 13, *supra*, requires states to adopt procedures to as-

applicants and did not refer to recipients at all. 36 Fed. Reg. 3864 (1971). The regulation was amended in 1978 to include "[a]pplicants and all individuals who inquire about the program" (43 Fed. Reg. 6951) in order "to ensure that State and local agencies furnish information * * * about the financial assistance and medical assistance programs" to "all persons, whether they are actual or potential applicants or merely persons seeking information" (*id.* at 6949). This amendment was repealed in 1979 (see 44 Fed. Reg. 17943), but it shows that the Secretary intended that the regulation not encompass recipients.

¹³ Relying on one of the Secretary's answers to interrogatories in district court, the court of appeals suggested (Pet. App. A10 n.10) that the Secretary has construed 45 C.F.R. 206.10(a)(2)(i) to require advance written notice to AFDC recipients of the lump-sum rule's operation and effect. The court of appeals, however, misread the Secretary's answers. As we pointed out in our amicus brief at the petition stage (at 13 n.7), the Secretary stated that "[a] State has considerable latitude in the development of procedures it shall adopt to ensure effective administration of the AFDC program" and that "[p]rovisions at 45 C.F.R. § 206.10(a)(2)(i) do not require a State to publicize the lump sum rule * * *" (J.A. 90-91). Thus, while he advised that "45 C.F.R. § 206.10(a)(2)(i) and (ii) require a State agency to inform AFDC applicants and recipients about eligibility requirements," including "generally advising applicants and recipients of their obligation to report receipt of lump sum income, the operation of the lump sum rule, and [its] effect on eligibility for assistance" (J.A. 89 (emphasis added)), the Secretary also stated that it is "not until a State takes action to terminate, discontinue, suspend or reduce assistance [that it is] * * * required to give timely and adequate written notice of the specific adverse action" and the reason for it (*ibid.*).

sure that recipients make timely and accurate reports of any change in circumstances which may affect their eligibility or the amount of assistance they receive. Manifestly, that provision vests broad discretion in the states concerning the manner and form in which relevant additional information will be furnished to recipients. The clear premise of this provision is that a recipient has a continual obligation to report to his caseworker certain events, such as the receipt of new income or resources that might affect his eligibility to participate in the AFDC program, so that the caseworker can then inform the recipient of the consequences of the event. The states may orally inform a person whose application is approved that he must notify his caseworker when he receives new income or resources, because that money might affect his eligibility for AFDC benefits. The states are free to inform recipients in writing about the operation of the lump-sum rule, but the Secretary has not required the states to implement 45 C.F.R. 206.10(a)(2)(ii) in that manner. While that provision encourages the states to take measures to alert recipients to this obligation, it basically assumes that recipients will learn about changes in the AFDC program directly from their caseworkers.

The court of appeals also erred in determining the type of notice that must be given to AFDC applicants. The court affirmed the district court's order requiring petitioner to include a detailed explanation of the operation of the lump-sum rule in the pamphlets that petitioner provides to applicants. The Secretary does not construe his regulation, however, as imposing that type of burden on petitioner. Section 206.10(a)(2)(i) does not require states to provide applicants with advance written notice of the mechanics of any aspect of the AFDC program, in-

cluding the lump-sum rule. As Judge Fagg noted in his dissent below (Pet. App. A24), the regulation was not adopted in response to the lump-sum rule, it is of general applicability, and it does not require that the implementation of new eligibility requirements be preceded by advance written notice. Rather, 45 C.F.R. 206.10(a)(2)(i) simply requires the state to make known generally in written form, and orally as appropriate, the AFDC program, its availability, and its broad outlines.

Contrary to the assertion of the courts below (Pet. App. A10-A11, A48-A51), interpreting the Secretary's regulation in accordance with its plain language does not undermine the ability of AFDC recipients to budget their monies in conformity with the lump-sum rule. Persons who participate in the AFDC program, like all other citizens, are presumed to know the requirements of the law and their obligation to comply with it. See *Atkins v. Parker*, 472 U.S. 115, 127-131 (1985). Moreover, when an individual is accepted into the AFDC program, he will be informed that certain events, such as the receipt of additional money, can affect his eligibility for benefits and therefore that he should promptly report any change in circumstances to his caseworker. The caseworker can then inform the recipient whether and how a particular change in circumstances (such as the receipt of a lump sum) affects the recipient's benefit eligibility. AFDC recipients who follow these instructions should be capable of budgeting their monies in the manner intended by the lump-sum rule. The result is that AFDC recipients should generally be able to budget their monies in the manner intended by the lump-sum rule unless they ignore the instruction that they promptly report

any change in their circumstances to their caseworkers so that the caseworkers can explain the effect of that change to them.¹⁴

To be sure, as the courts below noted (Pet. App. A10, A12-A13, A48-A51), some AFDC recipients may fail to learn about the requirements of a rule, such as the lump-sum rule; others may fail timely to report the receipt of lump sums; and some may deal with caseworkers who fail accurately to inform them of the existence or effect of the lump-sum rule. These are unfortunate cases (not directly addressed by the broad holdings of the courts below).¹⁵ But a written

¹⁴ The court below erred in suggesting (Pet. App. A13-A14) that it should not defer to the Secretary's interpretation both because the Secretary had explained his regulations in the context of litigation and because that explanation "conflicts with the plain language of the rule, and would deprive the rule of much of its significance in this context." The Secretary's interpretation of his own regulation is entitled to deference, whether or not it is articulated in the course of litigation. See *Lukhard v. Reed*, slip op. 9, 12 (plurality opinion); *United States v. Morton*, 467 U.S. 822, 835-836 n.21 (1984). Moreover, as discussed in text, the Secretary's interpretation is consistent with the language of the regulation and gives equal significance to the regulation in the context of the lump-sum rule as in any other context.

¹⁵ As a legal matter, these individuals are still presumed to know the requirements of the law and to be able to budget their receipts in conformity with those requirements. *Atkins v. Parker*, 472 U.S. at 127-131 (welfare recipients are presumed to know the requirements of the law); see *Heckler v. Community Health Services*, 467 U.S. 51, 63-66 (1984) (the government cannot be estopped by its agents' failure to advise persons accurately of a law's existence or effect); *Schweiker v. Hansen*, 450 U.S. 785, 789-790 (1981) (same).

The statute allows a state to recalculate the ineligibility period for persons in three situations: where an event occurs during a month of ineligibility that, had the family been

notice requirement, as a practical matter, would not eliminate these problems. Such notice would of necessity often be furnished far in advance of the occurrence of a relevant change in circumstances, and it would presumably be only one of many comparable written explanations of the often intricate provisions of the program. Accordingly, the Secretary has determined (1) that, for the most part, information is most effectively conveyed by face-to-face communications between program participants and caseworkers, and (2) that, except for general information requirements, the cost of advance written notices concerning the operation and effects of particular AFDC rules is too high, and the reliability of written notices to accomplish this purpose too low, to justify requiring all states to send them.

The Secretary's judgment that his regulation should not be interpreted to require advance written notice of changes in AFDC program rules that affect eligibility (such as the lump-sum rule) is reasonable. The cost of complying with such a regulation would be very substantial: Congress and the Secretary are continuously adjusting the myriad requirements that can affect eligibility in the AFDC program; the states would therefore be required to expend sizeable sums on printing and mailing letters

receiving benefits, would have changed the amount of aid payable that month (such as where the state standard of need increases); where the income has become unavailable because of reasons beyond the family's control (such as theft); and where the family incurs medical expenses. See 42 U.S.C. (Supp. III) 602(a)(17). This case does not present a question whether a caseworker's error fits within the second of these situations. The Secretary, however, takes the position that caseworker error does not amount to a circumstance beyond the control of a recipient.

concerning such changes to AFDC program recipients. Such diversions of the finite funds available for the program from benefits payments to administrative costs must be avoided where possible. Moreover, while the states may find it desirable and appropriate in special circumstances to provide such written notice (in addition to carrying out the ordinary information dissemination requirements), the benefit to AFDC recipients of doing so in all circumstances is questionable. Even if large numbers of recipients would be affected by a particular change in program conditions, which is usually not the case, flooding recipients with notices about every program change would discourage them from reading any of the notices with care to determine whether any particular change affects them. Rather, recipients would be more likely to rely on their caseworkers to inform them of how their eligibility for benefits has been affected by any particular change in their circumstances, which is precisely why the Secretary has not required states to expend limited funds on expensive mailing programs. That judgment—as to what information his regulations require to be disseminated and how that information is best disseminated—is entitled to deference from the courts. See *Lukhard v. Reed*, slip op. 12 (plurality opinion); *Lyng v. Payne*, No. 84-1984 (June 17, 1986), slip op. 12-13; *Atkins v. Parker*, 472 U.S. at 127 n.29 ("What judges may consider common sense, sound policy, or good administration, however, is not the standard by which we must evaluate the claim that the notice violated the applicable regulations."); *Blum v. Bacon*, 457 U.S. 132, 141-142, 145-146 (1982). The decision below

errs in failing to accord that deference to the Secretary's interpretation.¹⁸

¹⁸ The Court need not reach any other issue if it agrees with our submission that the judgment below should be reversed on the ground that 45 C.F.R. 206.10(a)(2)(i) does not require applicants and recipients to receive advance written notice of the mechanics of the lump-sum rule. We also agree, however, with the dissenting judge in the court of appeals (Pet. App. A23-A25 (Fagg, J.)) that the majority erred in concluding that 45 C.F.R. 206.10(a)(2)(i) requires notice of the operation of the lump-sum rule as a condition of the effectiveness of that rule. The text of 45 C.F.R. 206.10(a)(2)(i) does not purport to modify either the OBRA provision establishing an effective date for the lump-sum rule or the statute and regulation requiring a state to recoup overpayments, 42 U.S.C. (Supp. III) 602(a)(22) and 45 C.F.R. 233.20(a)(13). Whether the state may be enjoined on any other ground from recouping overpayments from persons prejudiced by incorrect or inadequate advice from their caseworkers was not considered by either court below, and this Court ordinarily would not address that question in the first instance. See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975). But cf. *Atkins v. Parker*, 472 U.S. at 127-131 (due process does not require specific notice to food stamp recipients about statutory changes in benefits).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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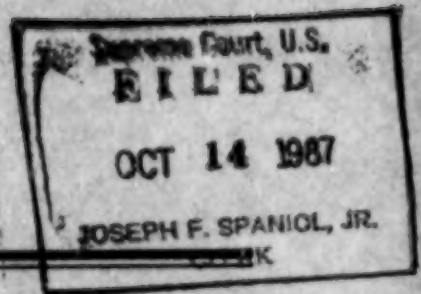
*Department of Health
and Human Services*

AUGUST 1987

RESPONDENT'S

BRIEF

No. 86-978



IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

SANDRA GARDEBRING, Commissioner of the Minnesota
Department of Human Services,
Petitioner,

v.

KATHRYN JENKINS,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

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QUESTIONS PRESENTED

1. Did the lower courts correctly conclude that 45 C.F.R. § 206.10(a)(2)(i), which provides that individuals shall be given written information about “conditions of eligibility” and the “responsibilities of applicants for and recipients of assistance,” requires the Commissioner to provide a written explanation of the Lump Sum Rule to members of the plaintiff class?
2. With respect to the relief granted:
 - (a) Did the district court abuse its discretion regarding the form, content and method of distributing the explanation of the Lump Sum Rule; and
 - (b) Did the court of appeals exceed its authority in enjoining the Commissioner from recouping the overpayment to Kathryn Jenkins, and only Kathryn Jenkins, under the special circumstances of her case?

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STATEMENT OF THE CASE

This is a class action on behalf of families with children who were denied vital information about a condition of eligibility for AFDC known as the Lump Sum Rule. This rule requires them to budget their lump sum income so that each month they spend no more than the amount of their former AFDC grant. Plaintiffs challenged the failure of the Commissioner of the Minnesota Department of Human Services to inform them of this condition as required by federal law.

From a reading of the Commissioner's brief and those of her *amici*, it is nearly impossible to discern that this case principally involves the failure of the Commissioner to explain a crucial condition of eligibility to *applicants* for AFDC, and that the federal regulation upon which plaintiffs based their claim explicitly requires "written" explanations of "conditions of eligibility." Accordingly, in order to set forth the relevant facts and provide the proper procedural setting for deciding the questions presented, plaintiffs have set forth their own statement of the case in greater detail than might ordinarily be expected.

1. THE LUMP SUM RULE AND ITS IMPLEMENTATION IN MINNESOTA.

No one disputes that the treatment of lump sum income in the AFDC program underwent a drastic change in 1981. Under prior law, lump sum income was considered income only in the month received and was treated as a resource thereafter. Receipt of a lump sum generally caused an AFDC overpayment in the month received. If, however, the lump sum was spent before the next month, the family remained eligible for AFDC as long as its resources did not exceed established limits. *See Lukhard v. Reed*, ___ U.S. ___, 107 S.Ct. 1807, 1810 (1987) (plurality op.).

Congress believed that the treatment of lump sum income had the "perverse effect of encouraging the family to spend such income as quickly as possible" and therefore amended the AFDC statute. S. Rep. No. 139, 97th Cong., 1st Sess. 505, *reprinted in* 1981 U.S. Code Cong. & Ad. News 396, 771. Under the amended statute, receipt of lump sum income causes a family to be ineligible for AFDC for a set number of months determined by dividing the amount of the lump sum by the AFDC standard of need for that family. Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, § 2304, 95 Stat. 357, 845 (1981) (codified at 42 U.S.C. § 602(a)(17) (Supp. III 1985)). The purposes of the statutory change were to remove any incentive to spend lump sum income quickly, and to encourage AFDC recipients to use lump sum income to meet their ordinary living expenses during their period of ineligibility for AFDC.

In September, 1981, petitioner, the Commissioner of the Minnesota Department of Human Services (hereafter "Commissioner") sent a letter to all persons who were then recipients of AFDC in Minnesota to explain the changes in eligibility conditions mandated by the 1981 law. Pet. App. 97-101. Included was a paragraph which purported to describe the treatment of "Lump Sum Money." *Id.* at 97-98. This letter did not explain that recipients would be required to use their lump sum income for regular living expenses; it did not explain the formula for determining the period of ineligibility or mention that there was a rigid formula; it did not even warn recipients to call their case workers *before* spending any money. Instead, the letter stated: "If the lump sum added to other family income totals more than the AFDC maximum for that size family, the family will be ineligible for the month in which the lump sum was received (and

possibly for a number of following months), whether or not the money is spent before the period of ineligibility has gone by." *Id.* at 98 (emphasis added).

The September, 1981 letter also contained statements which turned out to be inaccurate. The letter stated that certain rules, including the Lump Sum Rule, would be effective on October 1, 1981, while others would take effect on a later date. Pet. App. 97, 100. Several of the changes which, according to the September 18th letter, were to take effect on October 1, 1981, were enjoined shortly thereafter. *Minnesota Recipients Alliance v. Noot*, 527 F. Supp. 140 (D. Minn. 1981), and *Porter v. Schweiker*, 527 F. Supp. 150 (D. Minn. 1981). As a result, persons whose benefits had been reduced or terminated had their benefits reinstated in November, 1981, and were informed that the changes had been enjoined. *See* DPW Instructional Bulletin #81-62c (October 23, 1981) (a copy has been lodged with the Clerk).

Most significant for Kathryn Jenkins and this case is the fact that the Commissioner later determined that the Lump Sum Rule should not have been implemented until February 1, 1982. Pursuant to a stipulation and court order, persons whose AFDC benefits had been reduced or denied because of a lump sum received between October 1, 1981 and February 1, 1982 were notified that they could apply for a corrective payment. *Minnesota Recipients Alliance v. Noot*, No. 4-81 Civ. 658 (D. Minn. Aug. 9, 1982); *see also* Pet. Br. App. 2.¹ Lump sum income received by AFDC recipients during this four month period was treated in accordance with the old AFDC rules

¹ "Pet. Br. App." refers to the Appendix to petitioner's brief on the merits.

as income in the month received and a resource thereafter.

Although the Commissioner initially implemented the new Lump Sum Rule in October of 1981, it was not until July 5, 1985, pursuant to the district court order in this case, that the Commissioner prepared a written explanation of the Lump Sum Rule and instructed the local welfare agencies in the state to distribute it to all applicants for AFDC. *See* DPW Instructional Bulletin #85-68 (July 5, 1985) (a copy has been lodged with the Clerk). It is undisputed that the nearly 200,000 families who applied for AFDC between October, 1981 and July, 1985, received absolutely no written information concerning the operation of the Lump Sum Rule at the time of application or thereafter. *Resp. App. 1.*²

2. FACTS PERTAINING TO KATHRYN JENKINS

Kathryn Jenkins lives with her husband Raymond and their five minor children in Minneapolis. *Jt. App. 107.*³ In 1979, Mr. Jenkins was injured on the job and has been unable to work ever since. *Jt. App. 70, 107-108.*

The facts giving rise to this lawsuit began in November of 1982, a year after the Lump Sum Rule had been implemented, when the Jenkins family applied for AFDC and was found eligible on the basis of Mr. Jenkins's incapacity. When they applied for assistance, they informed the welfare agency that Mr. Jenkins had pending claims for workers' compensation and Social Security disability benefits. The agency therefore knew that Mr. Jenkins was likely to

² "Resp. App." refers to the Appendix which follows the Conclusion of the brief.

³ Their fifth child was born in 1986.

receive lump sum income while the family was on AFDC. In spite of this knowledge, no one from the agency explained anything to the Jenkins family either orally or in writing about the effect of the receipt of lump sum income on their AFDC eligibility. *Jt. App. 70, 108.*

On October 31, 1983, Raymond Jenkins received a retroactive Social Security disability payment of \$5,752.00. Two days later, on November 2, 1983, Kathryn Jenkins called her case worker to report receipt of the disability award. During this conversation, Ms. Jenkins learned for the first time that she and her family were expected to live on the lump sum funds for over seven months. *Jt. App. 70, 108.*

By this time, however, the money had been spent. The family had fallen behind on their home mortgage payments and had been advised by the bank that if the arrearage were not paid by twelve o'clock noon on October 31, 1983, the loan would be given to its attorneys to commence foreclosure proceedings. Therefore, they took the Social Security check directly to the bank on October 31st and paid \$3,863.75. On the same day, they paid an automobile repair bill of \$1,366 incurred over a year earlier with the understanding that it would be paid when a lump sum payment was received. And they used the remaining \$533 to make a payment to the lawyer handling the workers' compensation claim and to buy winter clothes for the children. *Jt. App. 70, 108.* On November 3, 1983, the agency sent the Jenkins family written notice that they were not eligible for the AFDC they received in October and November, and that they would remain ineligible until May, 1984. *Jt. App. 109.*

Kathryn Jenkins filed an administrative appeal of the proposed termination of her AFDC benefits. Pursuant to

federal regulations, she continued to receive AFDC pending the administrative appeal decision. 45 C.F.R. § 205.10(a)(6)(i) (1986). The Appeals Referee issued a recommended decision reversing the termination of her AFDC because she had not been given advance notice of the Lump Sum Rule. Jt. App. 69-73. The Deputy Commissioner, believing that the recommended decision would have violated federal policy, reversed. *Id.* at 73-76. In so doing, he took the unusual step of describing his displeasure with the harsh result reached:

The Federal policy regarding the treatment of lump sum payments is punitive [sic] and ignores the basic purposes of the AFDC Program. We do not like the Order in this case and would do anything to avoid the harsh result. . . . It does not please us to affirm the termination of the Petitioner's grant, but we see no alternative within current Federal policy.

Id. at 75.

The Commissioner and *amici* imply that Kathryn Jenkins acted in at least a derelict if not fraudulent manner by failing to report the lump sum income on the date it was received, and by spending the lump sum income before reporting it. Nothing could be further from the truth. All AFDC recipients in Minnesota must provide information about their income, resources, and household situation on a "Monthly Report." AFDC applicants are given a brochure which informs them that the report must be signed and dated "*on or after the last day of the month you are reporting about,*" and must be received by the local agency "*by the 8th calendar day*" of the following month. Jt. App. 31. Nor are applicants or recipients ever told that they must report lump sum income before spending it. Therefore, Kathryn Jenkins, who reported receipt of the lump sum income within two days of its receipt and

six days *prior* to the 8th of the following month, took steps beyond those required by the Commissioner for a timely report.⁴

The Jenkins family had been receiving AFDC in September of 1981 when the Commissioner sent the letter about the federally mandated AFDC changes. They were still receiving AFDC in December, 1981 and January, 1982, when Mr. Jenkins received a partial workers' compensation settlement, but they were subsequently terminated because of excess monthly income. Jt. App. 94-95, 120. When they reapplied for AFDC in November of 1982, they were required to provide receipts verifying how the lump sum income had been spent. Jt. App. 111. Because of the consent order in *Minnesota Recipients Alliance v. Noot*, (*see supra* pp. 3-4), the workers' compensation settlement was treated as income only in the month received, and it did not affect the Jenkins family's eligibility in November, 1982. Jt. App. 111. Therefore, Kathryn Jenkins had no reason to believe that the rules governing lump sum income had changed when she and her husband received the Social Security check a year later. In fact, the manner in which the workers' compensation settlement had been treated when she reapplied for AFDC in November, 1982, should have led her to the opposite conclusion.

⁴ The Commissioner's AFDC Program Manual which is used by local welfare department workers in their day to day administration of the program requires that the client be informed orally and in writing of the obligation to report the receipt of a lump sum "within 10 days or by the 8th of the following month, whichever is earliest [sic]." AFDC Program Manual § II-B(i). *See also* Minn. Rules § 9500.2700, Subp. 7 (1987).

3. PROCEEDINGS IN THE DISTRICT COURT.

Ms. Jenkins filed a Complaint in Intervention in September, 1984, in an action already pending in district court, claiming, *inter alia*, that the Commissioner had violated 45 C.F.R. § 206.10(a)(2)(i). The district court certified this action as a class action and granted summary judgment on this claim. Pet. App. 27-59. The court defined the class as follows:

Those individuals in the State of Minnesota who are otherwise eligible for AFDC benefits and who have been, or will be, found ineligible for AFDC benefits for a predetermined number of months as a consequence of receipt of lump sum income by one of the members of an AFDC assistance unit of which they have been a member, and whose lump sum has or will become unavailable to them in whole or in part prior to their reeligibility for benefits.

Pet. App. 32 (emphasis removed). The vast majority of the class are families, like the Jenkins family, who applied for AFDC after October 1, 1981, the date of the original implementation of the Lump Sum Rule in Minnesota. According to statistics compiled by the Minnesota Department of Human Services, over seventy percent (70%) of the AFDC case load receive AFDC for less than three years. Resp. App. 2, 3. Therefore, in December of 1984 when the class was certified, over seventy percent of the class had applied for AFDC after October 1, 1981.

The distinction between applicants and recipients stressed in this Court by the Commissioner was not raised in the district court. In the Memorandum in Support of Defendant Levine's Summary Judgment Motion and in Opposition to Plaintiffs' Motions for Summary Judgment and Intervention, the former Commissioner first addressed plaintiffs' notice claim as follows:

Nonetheless, the plaintiffs argue that such advance information is required by 45 CFR § 206.10(a)(2)(i). This regulation generally requires that *applicants and recipients* be informed about the scope of the AFDC program, eligibility requirements, their rights and obligations, and available related services. . . . Materials such as bulletins and pamphlets must be publicized and made available to *recipients*.

Id. at 24 (emphasis added). In support of his motion for reconsideration, the Commissioner argued that the relief ordered by the court would be "ineffective," not that it should not have been afforded to recipients at all. "The Department also is concerned that *recipients* will rely on information which becomes obsolete prior to their eligibility redeterminations." Memorandum in Support of Defendant Levine's Motion for Reconsideration at 6 (emphasis added).⁵

The district court found that the Department's failure to provide Ms. Jenkins and members of the class with adequate advance written notice of the Lump Sum Rule violated 45 C.F.R. § 206.10(a)(2)(i). Pet. App. 47-51. The court noted that because it had concluded that the defendant had violated the federal regulation, it would not reach plaintiffs' constitutional due process claim. *Id.* at 47.⁶

The court did not enjoin the Commissioner from applying the Lump Sum Rule to plaintiff class members. Rather, the court ordered the Commissioner to prepare a written explanation of the Lump Sum Rule to be given to all individuals at the time they apply for AFDC and again

⁵ A copy of each of these memoranda has been lodged with the Clerk.

⁶ The due process claim is not before this Court but could of course be litigated on remand if the decision of the court of appeals is not affirmed.

at the time of the periodic six month redetermination of eligibility. Pet. App. 57. The court also required the Commissioner to send this written explanation to persons then receiving AFDC. *Id.*

The Commissioner moved for reconsideration of the court's order on December 20, 1984, asking the court either to vacate its order pertaining to notice, or in the alternative, to modify the order to require only "advance up-to-date oral notice of the lump sum rule supplemented by written notice, to recipients who either report the likelihood of a lump sum receipt or whose circumstances indicate such a likelihood." Memorandum in Support of Defendant Levine's Motion for Reconsideration at 6-7; see Pet. App. 67. The Commissioner, who had filed a third-party complaint against the Secretary, also asked the court to order the Secretary to pay the federal share of any corrective payments made to class members.⁷

Finally, although not required by the court, the Commissioner submitted an eight page single spaced notice for the court's approval should the court continue to require general prospective notice of the Lump Sum Rule. Jt. App. 33-48. Plaintiffs objected to this notice because it was too long and did not highlight the Lump Sum Rule. Before the court ruled on plaintiffs' objections, the Commissioner submitted a second proposal. Jt. App. 54-57. The court denied the Commissioner's motion for reconsideration, but approved the Commissioner's second proposal over plaintiffs' objections, noting that

the defendant is entitled to a fair amount of deference when it comes to the question of notifying AFDC recipients about their rights and responsibilities

⁷ This request was granted over objections by the Secretary. Pet. App. 70-73.

under the program. . . . [T]he Court recognizes that the defendant possesses considerable expertise regarding administration of the AFDC program. The Court will therefore decline to dictate the precise parameters of the lump sum notice.

Pet. App. 69.

Subsequently, the Commissioner proposed to recover from Kathryn Jenkins the AFDC benefits she had received while her administrative appeal was pending. The Commissioner claimed that even if, as the court had held, Ms. Jenkins had not received an adequate explanation of the Lump Sum Rule, the AFDC benefits she received pending her appeal were an overpayment and would be recovered. On August 22, 1985, plaintiff filed a motion for contempt or, in the alternative, for supplemental relief. Ms. Jenkins sought, *inter alia*, an order enjoining the Commissioner from recovering the alleged overpayment. The district court denied plaintiffs' motion, concluding that the requested relief would have violated the Eleventh Amendment. Pet. App. 90.

4. PROCEEDINGS IN THE COURT OF APPEALS.

The Commissioner appealed the district court's orders granting summary judgment for plaintiffs. Ms. Jenkins appealed the district court order denying her motion to enjoin recoupment. The Secretary filed, but subsequently withdrew, an appeal of the district court's order requiring that the federal government pay its share of any corrective payments awarded as a result of the court's decision. Pet. App. 7 n. 8.

The Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. Pet. App. 2-23. The court agreed with the district court's holding that the Commissioner had acted unlawfully by failing to provide a written

explanation of the Lump Sum Rule and upheld the relief which the district court had fashioned. *Id.* at 8-16. The court's decision was based on the explicit language of 45 C.F.R. § 206.10(a)(2)(i) read together with the lump sum statute, 42 U.S.C. § 602(a)(17):

In short, we agree with the District Court that 45 C.F.R. § 206.10(a)(2)(i) by its terms requires advance written notice and admits of oral notice only as a supplement, and that, if this notice regulation is to serve its purpose fully, it must require effective written notice to all AFDC recipients and applicants of the lump-sum rule, a rule which requires advance notice to achieve its underlying purpose and which can have drastic consequences for those to whom it is applied.

Id. at 14.

The court of appeals reversed the district court's decision denying supplemental relief to Ms. Jenkins, concluding that the Eleventh Amendment did not bar an injunction granting the prospective equitable relief which plaintiff sought—a conclusion which the Commissioner no longer disputes. Pet. Br. 13 n. 10. The court then held that “an injunction barring the defendant from recouping the payments made to Jenkins during her ineligibility period would be consistent with the Eleventh Amendment, and would, moreover, be an appropriate remedy in this case.” Pet. App. 22. The court limited the scope of the relief by allowing recovery of any payments for which Ms. Jenkins would have been ineligible before OBRA. *Id.* at 21 n. 20.⁸

⁸ Kathryn Jenkins has not been a recipient of AFDC since May, 1987 when she became employed. However, federal regulations would require recoupment of the overpayment to Kathryn Jenkins if any member of the Jenkins household at the time the overpayment was incurred becomes a recipient in the future. 45 C.F.R. § 233.20(a)(13)(i)(B) (1986).

The dissent focused almost exclusively on the issue presented by plaintiffs' cross-appeal, namely, whether Ms. Jenkins was entitled to an order enjoining recoupment of her overpayment. He concluded that the federal regulation, which he believed to be of “general applicability,” did not override Congress's express provision that the Lump Sum Rule would become effective (in Minnesota) on February 1, 1982. Pet. App. 24-25. He concluded, accordingly, that overpayments created by the receipt of lump sum income could be recouped. *Id.* at 25. In a single sentence, without accompanying explanation, he also concluded that 45 C.F.R. § 206.10(a)(2)(i) did not require any explanation of the Lump Sum Rule. *Id.* at 24.

SUMMARY OF THE ARGUMENT

The federal regulation at issue in this case, 45 C.F.R. § 206.10(a)(2)(i), expressly requires that certain individuals be given written information about the “conditions of eligibility” for AFDC, and about the “responsibilities of applicants for and recipients of assistance.” The lump sum statute, 42 U.S.C. § 602(a)(17), was enacted by Congress to impose on AFDC recipients the responsibility to plan the use of lump sum income to cover ordinary living expenses during the period of ineligibility for AFDC. The congressional purpose cannot be met unless AFDC recipients have knowledge about the Lump Sum Rule before the money is received and spent. Therefore, the court of appeals was correct in concluding that the regulation, read together with 42 U.S.C. § 602(a)(17), required the Commissioner to explain the Lump Sum Rule.

The Commissioner gave no written explanation of the Lump Sum Rule to any individual at the time of application for AFDC or thereafter during the four year period between October 1, 1981, when the Lump Sum Rule was

first implemented, and July, 1985, when the Commissioner complied with the district court order in this case. The only written explanation of the Lump Sum Rule given before July, 1985 was incomplete, inaccurate, and confusing, and was only mailed to the small percentage of plaintiff class members who were AFDC recipients in September, 1981.

The Commissioner's contention, made for the first time in this Court, that 45 C.F.R. § 206.10(a)(2)(i) applies only to applicants for and not to recipients of AFDC, is incorrect. Interpreting "applicants" to include persons receiving assistance is supported by 45 C.F.R. § 206.10(a)(1)(iii), which refers to AFDC recipients whose eligibility is being redetermined as "applicants," and by the Secretary both during rulemaking proceedings and also earlier in this litigation.

This Court, however, need not reach the question of whether 45 C.F.R. § 206.10(a)(2)(i) requires that information be given to "recipients" as well as applicants because the decision of the court of appeals, which affirmed the method of distribution of the explanation of the Lump Sum Rule ordered by the district court, can be affirmed as an appropriate form of relief. The Commissioner does not dispute the proposition that 45 C.F.R. § 206.10(a)(2)(i), if read to require an explanation of the Lump Sum Rule at all, requires that the explanation be given to "applicants." The requirement of mailing the explanation to these same people periodically, at the time of their eligibility redetermination, was not objected to below, imposes no additional burden on the Commissioner, and is well within the court's equitable discretion. And the requirement of mailing the explanation one time to all then-recipients of AFDC was accomplished by the Commissioner in July, 1985, and is now moot.

The Commissioner's argument that the district court intruded on her administrative discretion and expertise is simply not supported by the record. By requiring that the explanation of the Lump Sum Rule be in writing, the court was merely carrying out the explicit requirement of the regulation. With respect to the content of the explanation, it was the Commissioner who first invoked the authority of the district court by asking for the court's approval of its draft explanation. The court ultimately approved the Commissioner's proposal, expressly deferring to the Commissioner's expertise.

The decision of the court of appeals remanding the case to the district court for entry of an injunction preventing the Commissioner from recovering the overpayment from the Jenkins family, and only the Jenkins family, was well within the court's equitable powers. Nothing in the AFDC statute restricts the court's power to fashion this remedy for Kathryn Jenkins. *See Heckler v. Day*, 467 U.S. 104, 119 n. 33 (1984). The Commissioner exaggerates and misrepresents the holding of the court of appeals. Plaintiff did not seek an injunction preventing implementation of the lump sum statute, and the court did not hold that the lump sum statute could not be implemented. It simply held that, on these facts, recoupment from the Jenkins family would be inequitable, a conclusion which this Court should not overturn.

ARGUMENT

I. THE COMMISSIONER VIOLATED 45 C.F.R. § 206.10(a)(2)(i) WHICH, READ TOGETHER WITH 42 U.S.C. § 602(a)(17), REQUIRES AN ADEQUATE WRITTEN EXPLANATION OF THE LUMP SUM RULE.

A. The Federal Regulation Requires Disclosure of the Lump Sum Rule to Applicants and Recipients.

The court of appeals properly held that the Commissioner violated 45 C.F.R. § 206.10(a)(2)(i) by failing to

provide a written explanation of the Lump Sum Rule. The language of the regulation, which is the necessary starting point, provides:

Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, *conditions of eligibility*, scope of the program, and related services available, and the rights and *responsibilities of applicants for and recipients of assistance*. Specifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity.

45 C.F.R. § 206.10(a)(2)(i) (1986) (emphasis added).

No one contends that the regulation is optional; the principal issue is what kind of information must be provided under it. If, as we now show, the Lump Sum Rule is a condition of eligibility which must be explained, then the Court must determine whether the court of appeals correctly required that the explanation be distributed not only at the time of application but also periodically thereafter.

1. The Lump Sum Rule Must Be Explained Pursuant to the Federal Regulation.

The Lump Sum Rule fits squarely within the categories of information which must be disclosed. The fact that a family which has received lump sum income will be ineligible for assistance for a set number of months is certainly a "condition of eligibility," or "rule regarding eligibility." See 45 C.F.R. § 206.10(a)(2)(i) (1986). The requirement that the AFDC recipient budget the lump sum so as to spend no more each month than the former AFDC grant

is also one of the "responsibilities of . . . recipients of assistance." *Id.* In fact, when regulations implementing the Lump Sum Rule were promulgated, HHS commented: "It is the *responsibility* of the caretaker to budget accordingly." 47 Fed. Reg. 5648, 5655 (Feb. 5, 1982) (emphasis added).

The Commissioner acknowledges that "[the regulation] requires '[s]pecifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms. . . .'" Pet. Br. 21. She does not and could not claim that the Lump Sum Rule is not a "condition of eligibility." Rather, the Commissioner argues that the pamphlets envisioned by the regulation could not possibly explain all of the AFDC eligibility rules, and therefore, that the regulation does not require that *any* specific eligibility rule be described. *Id.* Although it is true that the regulation does not identify any specific eligibility rule by name, it does not follow that the Lump Sum Rule need not be described; the express language of the regulation includes the Lump Sum Rule within its scope.

The Solicitor General asserts that the regulation "simply requires the state to make known generally in written form, and orally as appropriate, the AFDC program, its availability, and its broad outlines." S.G. Br. 20. This view ignores the second and third sentences of the regulation, and finds no support in the language of the regulation as a whole.

The Solicitor's unsupported assertion is also inconsistent with the history of the regulation. The Department of Health, Education and Welfare (HEW) first discussed 45 C.F.R. § 206.10(a)(2)(i) when it was amended in 1978. In the preamble to the final rules, HEW reviewed the comments to the proposed rules:

One State welfare agency objected to the words 'conditions of eligibility' as they are constantly being changed. The agency felt that this necessitated revision and reprinting of pamphlets at a great expense to the agency.

HEW's response followed:

Although eligibility conditions change as a result of change in law, it is expected that even as instructional material is made available to agency staff regarding program eligibility changes, an informational flyer could also be prepared for public dissemination.

43 Fed. Reg. 6949, 6950 (Feb. 17, 1978). Clearly, in 1978 HEW did not intend to limit the necessary disclosures to the "broad outlines" of the AFDC program.

As the court of appeals recognized, the Secretary's own views expressed in this action in 1984 appear to be consistent with the agency's opinion in 1978. Pet. App. 10 n. 10. The Commissioner submitted interrogatories to the Secretary concerning the federal agency's position on various issues being litigated. Jt. App. 87-92. In response to a question concerning the requirement of advance notice of the Lump Sum Rule, the Associate Commissioner for Family Assistance at HHS stated under oath as follows:

Federal regulations at 45 C.F.R. § 206.10(a)(2)(i) and (ii) require a State agency to inform AFDC applicants and recipients about eligibility requirements and their rights and obligations under the AFDC program. Under these requirements, states are fully expected to establish policies to ensure that individuals are provided information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program and related services available. *This would include generally advising applicants and recipients of their obligation to report receipt of lump sum income, the operation of*

the lump sum rule, and the effect on eligibility for assistance.

Jt. App. 89 (emphasis added).

The Solicitor General misrepresents the position of the Secretary in this litigation by quoting incomplete sentences from the Answers to Interrogatories. In response to an interrogatory asking whether the federal regulation requires the Lump Sum Rule to be publicized "in specifically developed pamphlets or bulletins for general distribution to AFDC applicants and recipients," the Secretary responded:

Provisions at 45 C.F.R. § 206.10(a)(2)(i) do not require the State to publicize the lump sum rule *or any other eligibility requirements in specifically developed pamphlets or bulletins.*

Jt. App. 91. The Solicitor General chose to omit the italicized words, replacing them by "***," and thereby altered the import of the answer. S.G. Br. 18 n. 13; S.G. Cert. Br. 13 n. 7. When the full sentence is read and considered with the response to the previous interrogatory quoted above, *supra* pp. 18-19, it is clear that the Secretary here was indicating only the state's latitude to choose the type of written materials used to describe the Lump Sum Rule.

2. Applicants and Recipients are Entitled to a Written Explanation of the Lump Sum Rule.

Having determined that the Lump Sum Rule is a crucial condition of eligibility which must be explained, we turn to the second question: who is entitled to the explanation. The Commissioner (and the Solicitor General) concede that "applicants" are entitled to written information under 45 C.F.R. § 206.10(a)(2)(i). They now argue, however, that an individual whose application for AFDC

has been granted becomes a "recipient" and is no longer entitled to any written information under this regulation.⁹

The Commissioner never argued in the district court that there was any material distinction between applicants and recipients. *See* Statement of the Case, *supra* pp. 8-10. In the court of appeals, although the Commissioner did contend that recipients were not entitled to advance notice of the Lump Sum Rule, the argument did not focus on the distinction between applicants and recipients.¹⁰ *See, e.g.* Brief of Appellant at viii, 15, 16, 25, *Slaughter v. Levine*, 801 F.2d 288 (8th Cir. 1986). On the contrary, the Commissioner appears to have conceded that recipients are entitled to information under 45 C.F.R. § 206.10(a)(2)(i). In defending the adequacy of the September 18th letter, which was sent only to recipients, the Commissioner argued that "[b]y providing information about the lump sum rule in its September 18, 1981 letter, the state fully satisfied the general terms of 45 C.F.R. § 206.10(a)(2)(i)". Brief of Appellant at 32.

⁹ Neither the district court nor the court of appeals addressed the question of whether the regulation, by its terms, extends its protections to recipients. Indeed, there is no need for this Court to reach this question. The relief afforded to persons receiving AFDC, to the extent that it is not moot, can be affirmed as an appropriate exercise of the court's equitable discretion rather than as a result dictated by the federal regulation itself. *See* Section II (A)(2), *infra*, pp. 37-38.

¹⁰ The only sentence in the Commissioner's brief which even mentioned this issue was:

Basically, [the regulation] is directed toward new applicants, requiring that the state publicize the availability of the AFDC program through the use of pamphlets.

Brief of Appellant at 24, *Slaughter v. Levine*, 801 F.2d 288 (8th Cir. 1986).

This understanding of the scope of the rule, shared in the courts below by plaintiffs and the Commissioner and questioned for the first time in this Court, has also been the understanding of the Secretary. When the regulation was amended in 1978, the Secretary's responses to comments demonstrated the agency's understanding that both applicants and recipients were entitled to an explanation of eligibility rules. In response to one comment asking for clarification of what "information" had to be disclosed, the Secretary wrote:

Information as referred to in this regulation is confined to oral accounts and handout materials, such as pamphlets and brochures, that convey information regarding coverage and conditions of eligibility to those applicants for, or recipients of, assistance or to other individuals who seek information on the types of assistance or services that can be provided under the assistance programs.

43 Fed. Reg. 6949, 6950 (Feb. 17, 1978) (emphasis added). Moreover, the Secretary's answers to interrogatories in this case discuss without distinction the obligation of the state to provide notice to *applicants and recipients*. *Jt. App.* 89, 90-91.

The previously unanimous understanding of the applicability of the rule to recipients is confirmed by examining 45 C.F.R. § 206.10(a)(1)(iii), which provides that:

An applicant may be assisted, if he so desires, by an individual(s) of his choice (who need not be a lawyer) in the various aspects of the application process and the redetermination of eligibility. . . .

(emphasis added). The periodic redetermination of eligibility is a requirement of federal regulations. 45 C.F.R. § 206.10(a)(9)(iii) (1986). By definition, a redetermination

is conducted only with respect to recipients, *i.e.*, persons receiving AFDC. Yet 45 C.F.R. § 206.10(a)(1)(iii), like 45 C.F.R. § 206.10(a)(2)(i), refers only to "applicants." The "applicants" who are entitled to be assisted in the redetermination process must, by definition, be recipients and thus are the same "applicants" who are entitled to receive periodically the explanation of the Lump Sum Rule pursuant to the order of the district court.

Finally, recipients of AFDC must be informed of key eligibility rules in order to effectuate the regulatory requirement, emphasized by the Solicitor General, that "recipients make timely and accurate reports of any change in circumstances which may affect their eligibility or the amount of assistance." 45 C.F.R. § 206.10(a)(2)(ii) (1986); S. G. Br. 13. Unless recipients know the eligibility rules, they will not know what circumstances "may affect their eligibility" and are less likely to make timely and accurate reports.

B. The Purpose of the Lump Sum Statute Cannot Be Effectuated Without an Adequate Explanation in Advance.

The basic purpose of the AFDC program is to provide assistance to needy children, except where there is a "breadwinner" in the house who can be expected to provide such aid. *Lewis v. Martin*, 397 U.S. 552, 559 (1969). "AFDC was intended to provide economic security for children whom Congress could not reasonably expect would be provided for by simply securing employment for family breadwinners." *King v. Smith*, 392 U.S. 309, 329-30 (1968). "[P]rotection of [dependent] children is the paramount goal of AFDC." *Id.* at 325.

Congress did not depart from this basic goal when it enacted the lump sum statute. 42 U.S.C. § 602(a)(17)

(Supp. III 1985). Rather, Congress intended to eliminate what it considered to be the "perverse" effect under prior law of encouraging AFDC families to spend lump sum income as quickly as possible. S. Rep. No. 139, 97th Cong., 1st Sess. 505, *reprinted in* 1981 U.S. Code Cong. & Ad. News 396, 771. As Secretary Schweiker testified at hearings before the Senate Committee on Finance:

We are also introducing proposals to insure that people assume more personal responsibility for planning the use of income to meet their needs. When a large amount of money is received as a lump sum . . . we will consider it as income available for support not only in the month it is received, but to meet future expenses.

Hearings Before the Senate Committee on Finance, 97th Cong., 1st Sess. 18 (1981). Congress intended that AFDC recipients use their lump sum income for their ordinary living expenses.

If people do not know about the Lump Sum Rule in advance, it is virtually certain that they will not plan the use of the money so that it remains available to meet their ongoing needs. There are two entirely proper reasons why AFDC recipients are likely to spend lump sum income quickly unless they know the consequences. First, as the court of appeals recognized, AFDC recipients live at a subsistence level. They are likely to have unpaid bills and unmet needs as did the Jenkins family. Pet. App. 10. Thus, even if they know nothing about the treatment of lump sum income under the former rules, financial pressures will cause them to spend lump sum income quickly. Second, the policy in effect prior to implementation of OBRA allowed AFDC recipients to reestablish eligibility for benefits as soon as the lump sum funds were exhausted. Persons familiar with the former procedure,

either because they themselves had been AFDC recipients or because they knew AFDC recipients who had received lump sum income, would reasonably believe that they did not have to save the money for future use.

Unless families have advance notice of its operation, the Lump Sum Rule can have a devastating impact on those affected by it. *See* Pet. App. 49, 10-11. The Jenkins family, for example, was rendered ineligible for AFDC for seven months. Others who were originally plaintiffs in this action had periods of ineligibility in excess of a year.¹¹ The Minnesota welfare department itself recognized the inherent inequity of applying the Lump Sum Rule to deny AFDC to the Jenkins family since they had no advance knowledge of the Rule. *Jt. App.* 69-76; *see* Statement of the Case, *supra* p. 6. Surely, Congress did not intend to leave dependent children destitute for months at a time.

Plaintiffs do not argue, and the court of appeals did not hold, that every AFDC eligibility rule must be explained in writing. The Lump Sum Rule, however, is vastly different from most eligibility rules. First, it is a rule which imposes on recipients certain responsibilities; it requires recipients to take immediate affirmative steps. Knowledge of the Lump Sum Rule in advance is the only way to accomplish what Congress intended, namely, to ensure that AFDC families budget the lump sum income to meet their regular living expenses. Second, the consequences are irreversible. Without knowledge of the Rule, the fam-

¹¹ Sharon Slaughter, who was the original plaintiff and whose claim was settled prior to the district court's decision, was determined to be ineligible for 16 months. Complaint ¶ 16; Answer ¶ 16. Helen Stewart's period of ineligibility was approximately 14 months. *Jt. App.* 103.

ily will spend the lump sum income and will have no way to get the money back or to reestablish AFDC eligibility.

The Commissioner does not argue that knowledge of the Lump Sum Rule is unnecessary to effectuate congressional intent. Her major argument is that she will have to provide written explanations of so many eligibility rules that she will not be able to operate the AFDC program. In the same vein, she argues that the decision below will open the floodgates to litigation by welfare recipients seeking advance notice of every AFDC rule. These arguments have no merit.¹²

The eligibility rules proffered by the Commissioner as examples of rules about which AFDC applicants would have to be told are easily distinguished from the Lump Sum Rule. *See* Pet. Br. 34-35. The 18 year old who has dropped out of school can reenroll. The income of the stepparent and grandparent, unlike lump sum income, is deemed available to the household because of the reasonable assumption that certain relatives who live together share living expenses. The striker can return to work. The worker who loses his entire AFDC grant because he worked more than 100 hours two months in a row regains eligibility as soon as his hours are reduced. The daughter whose parents have given her a car can sell the car and use the money to live on.

¹² The Commissioner and the state amici, apparently misled by the Solicitor General's erroneous statement in the brief supporting certiorari, claim that 45 C.F.R. § 206.10(a)(2)(i) also applies to Old Age Assistance, Aid to the Blind, Aid to Permanently and Totally Disabled, and Supplemental Security Income throughout the country. Pet. Br. 16 n. 11; St. Br. 7; S.G. Cert. Br. 17. As the Solicitor General now recognizes, the regulation applies only to the programs for the aged, blind and disabled in the U.S. Territories. S.G. Br. 6-7 n. 4.

Nor is there any basis to assume that there will be a spate of lawsuits based on 45 C.F.R. § 206.10(a)(2)(i). There have been only a handful of recent cases concerning the federal requirement of advance notice of AFDC rules; all but one of these cases have involved the Lump Sum Rule.¹³ This pattern of litigation, and the absence of law suits challenging the failure to provide advance notice of AFDC eligibility rules other than the Lump Sum Rule, indicate the invalidity of the Commissioner's argument that she will be unable to administer the AFDC program effectively.

There may be gray areas in which reasonable minds might differ about the wisdom of requiring advance notice, but this case is not one of them. Even the state *amici* agree. "No one suggests that the lump-sum rule should be kept a secret from welfare recipients; merely

¹³ *Hill v. Fulton*, No. Civ. 87-943-P (W.D. Ok. Aug. 13, 1987) (preliminary injunction for plaintiff AFDC recipients); *Johnson v. Griepentrog*, No. CV-S-85-914-HDM (D. Nev. May 28, 1987) (Order, pursuant to Stipulation, providing for notice of the Lump Sum Rule and dismissal of case); *Turner v. Ledbetter*, No. C86-199R (N.D. Ga. June 24, 1987) (Order granting partial summary judgment to plaintiffs); *Westman v. Sugarman*, No. 87-2-00722-4 (Wash. Sup. Ct. for Thurston Cty. filed April 16, 1987); *Bulla v. Director, Dept. of Social Services*, 406 N.W.2d 908, 911 (Mich. App. 1987) (reversing termination of AFDC where explanation of Lump Sum Rule was not given when lump sum was reported); *Zarko v. Director, Dept. of Social Services*, 375 N.W.2d 765 (Mich. App. 1985) (affirming termination of AFDC based on lump-sum income despite lack of advance notice); *Woodruff v. Perales*, No. 82-1141-C (W.D. N.Y. Jan. 10, 1986) (Consent Decree providing for notice of Lump Sum Rule and dismissing constitutional claims). The one exception was *Pond v. Dept. of H.R.S.*, 503 So. 2d 1330, 1332 (Fla. App. 1 Dist. 1987) holding that the department had an affirmative duty to inform the AFDC applicant of its vendor policies under the "narrow circumstances" presented by the particular plaintiff.

that a two-page notice sent every six months is excessive and unnecessary. It is true that publicity of the lump-sum rule effectuates its purpose" St. Br. 10-11. If the states find that they need more guidance than the court of appeals provided about which eligibility rules must be explained, they should ask the Secretary to clarify his regulation. The possibility of gray areas does not justify reversing the decision of the court of appeals.

If not told in advance about the Lump Sum Rule, an AFDC recipient will have spent some or all of the lump sum income before being advised that her family will be ineligible for AFDC for a set number of months. The result is that needy, dependent children are deprived of the basic subsistence which Congress intended the AFDC program to provide. Moreover, Congress's purpose of discouraging AFDC recipients from spending lump sum income quickly, and ensuring that they instead plan the use of such money to meet ongoing needs, can only be met by telling them about the Rule and their concomitant obligations before it is too late. Congress must have anticipated that AFDC recipients would be informed of the Lump Sum Rule before having the Rule applied to them; only in this way could the Rule's dual purpose of protecting needy children and encouraging thrift be effectuated.

C. The Commissioner Did Not Afford Most Plaintiff Class Members Any Explanation of the Lump Sum Rule, and the Explanation Afforded the Others Was Inadequate.

Persons who applied for AFDC after October 1, 1981 received absolutely no written information about the Lump Sum Rule when they applied or afterward until the Commissioner complied with the district court's order in this case in July, 1985. For these people, the question of

whether recipients as well as applicants are entitled to notice is simply irrelevant.

The only class members who received anything in writing from the Commissioner mentioning the Lump Sum Rule were those persons who happened to have been recipients of AFDC in September of 1981. This subgroup is a small percentage of the people who have received the explanation of the Rule pursuant to the district court decision. The Commissioner sent the explanation of the Lump Sum Rule to all recipients in July of 1985. Of the 52,000 cases in July of 1985, approximately twenty-one percent (21%) had been recipients for four years. Resp. App. 3, 4. In June of 1986, approximately twelve percent (12%) of those persons receiving the explanation of the Lump Sum Rule at their periodic eligibility redetermination had been receiving AFDC for five years. *Id.* at 3. Between July, 1985 and June, 1986, over 50,000 persons filed applications for AFDC and presumably received the explanation of the Lump Sum Rule in accordance with the district court order. *Id.* at 1. Even if some small number of these people had been recipients of AFDC in September of 1981, no one would argue that a notice given five years earlier, however clear, would suffice.

Furthermore, the district court finding, adopted by the court of appeals, that the September, 1981 letter was "incomplete and confusing" was correct. Pet. App. 15. To effectuate Congress's intent, AFDC recipients must understand 1) that they are expected to live on their lump sum income for a set number of months, and 2) how the number of months of ineligibility will be calculated. The September, 1981 letter did not contain this information.

The explanation approved by the district court contained the necessary information in two short para-

graphs. Pet. App. 105-106. It could have been done in one or two sentences. In *Lukhard v. Reed*, ___ U.S. ___, 107 S.Ct. 1807 (1987), for example, this Court described this crucial aspect of the Lump Sum Rule in a single sentence: "AFDC recipients who receive an amount of income that exceeds the state's standard of need are rendered ineligible for as many months as that income would last if the recipients spent an amount equal to the State's standard of need each month." 107 S.Ct. at 1810. Even a notice which had simply warned recipients not to spend any portion of the lump sum until finding out from their workers the consequences of doing so would have conveyed more useful information than did the September 18th letter.

The September 18th letter was also inadequate because it contained information which turned out to be inaccurate. The Commissioner told recipients that some changes to the AFDC program would take effect on October 1st. Pet. App. 97. Although implementation of several of the changes, including the Lump Sum Rule, was enjoined for four months, the Commissioner sent no additional information. See Statement of the Case, *supra* pp. 3-4. Recipients who expected to be affected by one of these changes would have had good reason to disregard the letter as a whole when the expected effects did not occur. Persons like Kathryn Jenkins who received lump sum income during this four month period would have been likely to conclude either that the new Lump Sum Rule still allowed them to spend the income and regain eligibility, or that the change had not been implemented.

The Commissioner points out that OBRA had just been enacted on August 13, 1981, and that the Department had little time to prepare for implementation of its many changes. Pet. Br. 26. But this fact does not justify the

Department's failure to give any other written explanation of the Lump Sum Rule to any applicant or recipient, at any time, until ordered by a federal court almost four years later.

The court of appeals did not reject the September 18th letter because it was not the "best possible notice." See Pet. Br. 26. Rather, the court held that the Commissioner failed to comply with the requirements of 45 C.F.R. § 206.10(a)(2)(i). An incomplete and inaccurate letter given only to those few class members who happened to be recipients of AFDC in September, 1981, clearly did not fulfill the Commissioner's obligations under the regulation.

D. The Solicitor General's Interpretation of the Regulation Is Not Entitled to Deference.

The Solicitor General has submitted an *amicus curiae* brief "on behalf of the United States" supporting the Commissioner. However, as demonstrated above, the Secretary's views throughout this litigation have been contrary to those put forth by the Solicitor General. At best, the Secretary did not feel strongly enough about the issue before this Court to take a formal position in either the district court or the court of appeals.¹⁴

Assuming, however, that the Solicitor General does represent the current position of the Secretary, that posi-

¹⁴ The Secretary informed the district court that "HHS is not implicated in [the notice] claim and the third-party defendant has not responded." Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs Motions for Class Certification and Summary Judgment at 3 n. 2. The Secretary withdrew her appeal from the order requiring that she pay the federal share of any costs resulting from the court's summary judgment decision. Pet. App. 7 n. 8.

tion is not entitled to deference. The Solicitor General argues that the "regulation should not be interpreted to require advance *written* notice of changes in AFDC program rules that affect eligibility." S.G. Br. 22 (emphasis added). This contention conflicts with the explicit language of the regulation which requires information "in written form, *and orally as appropriate*" and is entitled to no deference. Cf. *Bowsher v. Merch & Co.*, 460 U.S. 824, 837 (1983).

The reason for deferring to an agency's rulings, interpretations and opinions is that they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The weight of that judgment and the concomitant degree of deference "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.* See also *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n. 5 (1978) (Rehnquist J., plurality opinion). These factors all suggest that the Solicitor General's opinion is entitled to little if any deference in this case.

When there is no evidence that an agency's interpretation was a result of thorough consideration, the agency's position is not entitled to deference. See, e.g., *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747, 762-64 (1973). In addition, a contemporaneous construction is entitled to more weight than a *post hoc* interpretation. See, e.g., *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n. 5 (Rehnquist J., plurality opinion) and *id.* at 302 (1978) (Stevens J. dissenting); *Chemehuevi Tribe of Indians v. Federal Power Commission*, 420 U.S. 395, 409-10 (1975). In this case, the evi-

dence shows that HHS gave thorough consideration to the scope of the notice requirement and the burden it imposed on the state welfare agencies at the time the rule was amended in 1978. See *supra* pp. 17-18, 21. The fact that HHS's position when the rule was amended was both thorough and contemporaneous counsels deference to HHS's prior position rather than the Solicitor General's present litigation position which was first articulated when the case reached this Court.

If an agency's position is neither longstanding nor consistent, its "power to persuade" is diminished, and hence deference is inappropriate. *Bowen v. American Hospital Ass'n.*, 476 U.S. 610, 106 S.Ct. 2101, 2122 n. 34 (1986) (Stevens J., plurality opinion); *Bankamerica Corp. v. United States*, 462 U.S. 122, 130-31 (1983); *Southeastern Community College v. Davis*, 442 U.S. 397, 411 n. 11 (1979), citing *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974). Here the position expressed in the Solicitor General's brief is not entitled to deference because it is inconsistent with the agency's interpretation at the time the rule was promulgated, and it is inconsistent with answers to interrogatories made under oath by the Associate Commissioner for Family Assistance.

It is also important to note the distinction between deference to an administrative agency and deference to appellate counsel. It is the agency's views which may be entitled to deference, not those of its lawyers. *Securities Industry Ass'n v. Board of Governors*, 468 U.S. 137, 143-44 (1984); *Investment Company Institute v. Camp*, 401 U.S. 617, 626-28 (1971), citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

Finally, if the Secretary really believes that the regulation ought to mean what the Solicitor General claims, or if

he wants to change it for any other reason, he is free to do so, provided he complies with the Administrative Procedure Act, 5 U.S.C. § 553, and the new regulation does not violate any substantive law. Because of the relative ease with which regulations can be amended (unlike a statute or the Constitution), courts should be far less concerned about deference in circumstances such as these.

E. *Atkins v. Parker* Is Inapposite.

The court of appeals did not reach the issue of whether the Commissioner violated the due process clause of the fourteenth amendment because it concluded that the federal regulation read together with the lump sum statute required an explanation of the Rule in advance. The Commissioner nonetheless relies on *Atkins v. Parker*, 472 U.S. 115 (1985), which was based upon a completely different regulation and the due process clause.

The situation presented to the Court in *Atkins v. Parker*, *supra*, was manifestly different from the instant case. In *Atkins*, food stamp recipients challenged the adequacy of a notice they received advising them that their food stamps would be reduced or terminated. The reductions were the result of a change in federal law. Congress had reduced the amount of earned income that would be disregarded from twenty percent (20%) to eighteen percent (18%).

The State of Massachusetts sent each food stamp household a written notice explaining in detail the change in federal law. The notice specified that only 18% (rather than 20%) of earned income would be disregarded, and that as a result, the household's food stamps would be either reduced or terminated. The issue before this Court was whether that notice satisfied the requirements of due

process, and the Court held that it did. *Atkins*, 472 U.S. at 117.

In this case, unlike *Atkins*, absolutely no notice was given to the vast majority of class members until it was too late. If the Commissioner had sent Kathryn Jenkins and her class the kind of notice which was challenged in *Atkins*, we would not be here today. A written notice explaining the change in federal law is exactly what was required by the court of appeals in this case.

The Commissioner argues that even though *Atkins* does not control, the decision of the court of appeals in this case should be reversed because it is based upon premises rejected by this Court in *Atkins*. Pet. Br. 28-31. The Commissioner is wrong. The premises rejected by this Court in *Atkins* were considered in the context of a due process challenge. Whether or not the Constitution would require a written explanation of the AFDC Lump Sum Rule, HHS's regulation can and does. The federal government can and in this case may have gone beyond the minimum requirements of the Constitution. The question before this Court is what the federal regulation requires, and on this question *Atkins* is immaterial.

In rejecting the constitutional challenge in *Atkins*, this Court relied on the presumption that all citizens know the law. *Atkins v. Parker*, 472 U.S. 115, 130 (1985). The regulation construed by the court of appeals here reflects a contrary conclusion which recognizes both the "labyrinthine complexity" and "Byzantine construction" of the Social Security Act, *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981); *Friedman v. Berger*, 547 F.2d 724, 727 n. 7 (2d Cir. 1976), and also the widespread literacy problems among welfare recipients. See 46 Fed. Reg. 42337 (Aug. 20, 1981). Given the complexity of the AFDC stat-

ute and the literacy problems of welfare recipients, it was eminently reasonable of HHS and its predecessor to require a written explanation of eligibility rules in clear and understandable language. This Court's decision in *Atkins* did not reject the premise underlying the regulation at issue here.

II. THE RELIEF AFFORDED PLAINTIFF CLASS MEMBERS AND JENKINS INDIVIDUALLY WAS WELL WITHIN THE COURT'S EQUITABLE DISCRETION.

The federal courts have inherent equitable powers to fashion a remedy for a violation of the law. *Mitchell v. Robert De Mario Jewelry Inc.*, 361 U.S. 288, 291-92 (1960); *Porter v. Warner Holding Co.*, 327 U.S. 395, 398 (1946). The comprehensiveness of the court's equitable powers is not to be denied or limited in the absence of a statute which "in so many words, or by a necessary and inescapable inference," restricts the court's powers. *Porter v. Warner Holding Co.*, 327 U.S. at 398; see also *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The standard of review of the exercise of those equitable powers is whether the court abused its discretion. *Albemarle Paper Company v. Moody*, 422 U.S. 405, 424-25 (1975); *Langnes v. Green*, 282 U.S. 531, 541 (1931).

A. The Relief Affording an Explanation of the Lump Sum Rule to Plaintiff Class Members Was Well Within the Court's Equitable Discretion.

The court of appeals affirmed the relief fashioned by the district court requiring the Commissioner to provide an explanation of the Lump Sum Rule to plaintiff class members. The court ordered that a written explanation be prepared, and that the explanation be given to all AFDC applicants at the time of their application and periodically

thereafter. The court also required the Commissioner to send this explanation to all persons then receiving AFDC. The requirements imposed as to the form and content of the explanation, and the mechanisms for its distribution, were well within the court's discretion.

1. The Form and Content of the Explanation.

The explicit language of the regulation requires that the explanation of the Lump Sum Rule be in writing. 45 C.F.R. § 206.10(a)(2)(i) (1986). The regulation permits an oral explanation only as a supplement, where appropriate. *See* Pet. App. 14, 67.

The Commissioner and the Solicitor General argue that the court of appeals erred by requiring that the explanation of the Lump Sum Rule be *in writing*. Pet. Br. 32-33, S.G. Br. 12, 22. This argument is based solely on policy considerations involving judgments about the most effective means of communication and the balancing of costs and effectiveness.

The Commissioner's quarrel with the requirement of a written explanation is, at bottom, a quarrel with the regulation. The resolution of the policy question of whether written or oral notice is more effective should be made not by this Court but by the Secretary, incident to a petition for a rule change. The district court's interpretation of the regulation to require a *written* explanation was plainly correct and should not be disturbed.

The district court also approved a two page notice which includes an explanation of the Lump Sum Rule. The Commissioner now implies that it was unreasonable for the court to have required that the notice be thorough and contain examples of the statute's operation. Pet. Br. 21. The fact is, however, that plaintiffs urged the court to

keep the notice short and simple. It was the Commissioner who wanted to include more information in the notice.

The first notice submitted by the Commissioner to the district court for approval was a "draft" eight page single spaced notice which included examples of the operation of the lump sum formula. Jt. App. 33-48. Plaintiffs objected to this notice because it was much too long, and submitted a one page notice as an alternative. In response, the Commissioner submitted a two page notice which contained more information than the plaintiffs' proposed notice. The district court approved the Commissioner's proposal over plaintiffs' objections, expressly deferring to the Commissioner's expertise. Pet. App. 68-69; *see also* Pet. App. 87-88.

Since the Commissioner used examples to explain the Lump Sum Rule in his first proposal, since the Commissioner's proposed notices were longer than the plaintiffs' proposals, and since the district court approved the Commissioner's proposal, the approval of the content of the explanatory notice cannot be an abuse of discretion.

2. The Method of Distributing the Explanation of the Lump Sum Rule.

The Commissioner was required by the district court to distribute the written explanation of the Lump Sum Rule to all applicants at the time of their application for AFDC and periodically thereafter. The Commissioner objects to this requirement not because it is burdensome, but because she claims that HHS's regulation does not require that it be distributed to recipients. Even if this Court disagrees with plaintiffs' arguments in Section I(A)(2), *supra* pp. 19-22, and agrees with the Commissioner that 45 C.F.R. § 206.10(a)(2)(i) does not require that any infor-

mation be given to recipients, the requirement of periodic distribution should still be affirmed.

Once an application for AFDC has been approved, the family's continued eligibility must be periodically redetermined. 45 C.F.R. § 206.10(a)(9)(iii) (1986). At each redetermination, a packet of materials is sent to the family, and the family is required to complete and return various forms in order to verify its continued eligibility. The additional burden of including a single piece of paper in the packet already being sent to an AFDC family is wholly trivial.

Balanced against the burden to the Commissioner is the potential benefit to plaintiff class members of a periodic reminder about the Lump Sum Rule. Given the drastic consequences likely to result from not knowing about the Lump Sum Rule, the potential benefit of a periodic reminder is clearly substantial. Finally, the Commissioner failed to object to this method of distribution. Having failed to assert any objection, the Commissioner should be barred from raising objections here. *See, e.g., Oneida, N.Y. v. Oneida Indian Nation*, 470 U.S. 226, 244-45 (1985).

The Commissioner was also required to send the explanation of the Lump Sum Rule to all persons who were then receiving AFDC. The Commissioner complied with this requirement in July of 1985. Therefore, this aspect of the relief is moot. *See DeFunis v. Odegaard*, 416 U.S. 314, 316 (1974).¹⁵

¹⁵ This part of the order did not constitute an abuse of discretion in any case. Approximately seventy-eight percent of the 52,000 recipients in July of 1985 had applied for AFDC after October 1, 1981 and had received no written information about the Lump Sum Rule. Resp. App. 3, 4. There can be no question as to the need for relief for

3. The Burden of Explaining Other Rules.

This case concerns only the Lump Sum Rule. The relief fashioned by the district court and affirmed by the court of appeals must stand or fall in the context of this case. The Commissioner concedes that complying with the court's order with respect to the Lump Sum Rule "may not be impractical." Pet. Br. 34.¹⁶ In fact, the Commissioner is not really concerned about the burden imposed by giving advance notice of the Lump Sum Rule. The underlying concern of Minnesota and other states is that the decision below may have some persuasive value in possible future litigation seeking advance notice of other eligibility rules.

Whether or not the concern is justified, the argument is being presented in the wrong forum. Congress left much of the administration of the AFDC program to the Secretary. 42 U.S.C. § 1302 (Supp. III 1985). If the Commissioner now determines that the requirements of 45 C.F.R. § 206.10(a)(2)(i) have become too burdensome, she can petition the Secretary to amend the regulation. It is not the role of this Court to nullify a rule the Commissioner now finds inconvenient.

them. As for the others, who had only received the misleading and incomplete September, 1981 letter, the Commissioner never argued that sending them the explanation was burdensome. Indeed, identifying and excluding those recipients who had received the September, 1981 letter would have imposed far greater burdens on the Commissioner.

¹⁶ The Commissioner conceded in the district court that the distribution of the explanation of the Lump Sum Rule required by the court would not impose significant administrative inconvenience or expense, and did not seek a stay of this part of the court's order. Pet. App. 67 n. 5; Pet. App. 80 and n. 1.

B. The Injunction Forbidding the Commissioner from Recovering the Overpayment from Kathryn Jenkins Was Well Within the Court's Discretion.

The court of appeals directed the district court to enter an injunction prohibiting the Commissioner from recouping any overpayment to the Jenkins family which would not have been an overpayment under the pre-OBRA treatment of lump sum income. This relief was well within the court's equitable discretion.¹⁷

Kathryn Jenkins had a right to a written explanation of the Lump Sum Rule in advance. Although the court of appeals found that this right had been violated, the Commissioner argues that the court was powerless to provide a remedy. The court had the responsibility to find an appropriate remedy; the remedy it chose was narrowly tailored to redress the violation.

In opposing the relief granted to Ms. Jenkins, the Commissioner makes two types of arguments: equitable and statutory. Neither is correct.

1. The Equities Support Ms. Jenkins.

The Commissioner attempts to disparage Ms. Jenkins's integrity. The uncontroverted facts establish that Ms. Jenkins's actions were entirely reasonable. *See* Statement of the Case, *supra* pp. 5-7. The Commissioner is fully responsible for the fact that the Jenkins family was unable

¹⁷ The Commissioner exaggerates the holding of the court of appeals. Plaintiffs did not seek an injunction against the application of the Lump Sum Rule as to the class or as to Ms. Jenkins. The court of appeals merely enjoined the Commissioner from recovering the portion of the overpayment to Kathryn Jenkins which would not have been an overpayment before OBRA. Pet. App. 21 n. 20.

to use the lump sum income to live on as Congress had intended.

The Commissioner also invokes the interests of other AFDC recipients. She argues that if the overpayment to the Jenkins family is not recovered, less money will be available for other recipients. The monthly benefits paid to AFDC recipients are established by state law. Recipients will get not a penny more if the \$5,000 overpayment to the Jenkins family is recovered. Moreover, the impact of \$5,000 on the Commissioner's budget is undeniably inconsequential.¹⁸

The Commissioner argues that it was inequitable to treat Kathryn Jenkins better than recipients like Helen Stewart who did have actual knowledge in advance about the operation and effect of the Lump Sum Rule. Pet. Br. 39-40. The flaw in this argument is that recipients who had advance notice of the Lump Sum Rule are not affected at all by the relief granted Ms. Jenkins. When fashioning an equitable remedy, the court must consider the interests of the parties and the public. Neither Helen Stewart nor the public at large would be better off in any way if the Commissioner were able to recover the full overpayment tomorrow. If there is any inequity, it is not caused by the lower court's order, but by the failure of the Commissioner to ensure that all AFDC applicants were adequately informed of the Lump Sum Rule.

Finally, the Commissioner makes two points in an attempt to minimize the harm to the Jenkins family. First, the Commissioner argues that the termination of AFDC to Kathryn Jenkins was not as harsh as it appeared to the

¹⁸ The average monthly expenditure in Minnesota in fiscal year 1986 for AFDC was \$23,869,911. Resp. App. 4.

court of appeals because she could have received General Assistance. What the Commissioner neglects to tell the Court is that the General Assistance payments to the Jenkins household of four children and two adults would have been approximately \$424 per month, which is only sixty percent (60%) of the amount that Minnesota had determined to be the minimum amount necessary to provide an AFDC family of the same size with "a reasonable subsistence compatible with decency and health." Minn. Stat. § 256.74 Subd. 1 (1986).¹⁹

Second, the Commissioner correctly points out that the \$5,000 overpayment to the Jenkins family would have been recovered by reducing the grant by only one percent per month. Although this would be a small monthly reduction, the court of appeals recognized that "AFDC recipients live at a subsistence level; they are likely to have unpaid bills and basic needs not entirely met by AFDC." Pet. App. 10. The lower court could reasonably have concluded that the harm to the Jenkins family of even a \$7 per month reduction in income would far outweigh the harm to the Commissioner.²⁰

Clearly, enjoining the Commissioner from recouping the overpayment to Kathryn Jenkins, and only Kathryn Jenkins, was reasonable.

2. The AFDC Statute Does Not Deprive the Court of Its Equitable Power.

The Commissioner relies on two provisions of the AFDC statute to support her contention that the court of

¹⁹ See DPW Instructional Bulletin #83-2 (January 4, 1983) (a copy has been lodged with the Clerk).

²⁰ The Commissioner's share of the recovery from the Jenkins family would be less than \$3.50 per month.

appeals should not have enjoined the recoupment of benefits from Ms. Jenkins. It is well settled that a court's equitable powers will only be limited when Congress has expressed a clear intention to do so. *See Porter v. Warner Holding Co.*, 327 U.S. 395, 398 (1946). Neither the effective date provision of the lump sum statute nor the overpayment recovery provision indicates any intent by Congress to restrict the court's equitable power to fashion a remedy in an individual case.

The amendment to the AFDC statute creating the Lump Sum Rule was part of OBRA, which was enacted on August 13, 1981, with an unusually flexible effective date. The statute was to become effective on October 1, 1981, unless existing state law prevented compliance. In states in which compliance with OBRA would have conflicted with existing state law, the OBRA amendments were not to take effect until the first month following the end of the next state legislative session. Pub. L. No. 97-35, § 2321, 95 Stat. 357, 859-60 (1981).

There is nothing in the OBRA effective date provision which evidences an intent to restrict the equitable powers of a federal court. All statutes have effective dates. The mere existence of an effective date provision would not deprive a federal court of the power to enjoin its implementation in an appropriate case. The effective date provision here certainly did not deprive the court of the power to fashion a narrow remedy for the Jenkins family. *See Heckler v. Day*, 467 U.S. 104, 119 n. 33 (1984).

The Secretary's own implementation of the OBRA amendments further undercuts the argument that the effective date provision of the statute overrode the court's equitable power. The Secretary has established sophisticated quality control mechanisms to ensure that state

AFDC programs comply with federal law. When quality control audits identify too many errors, fiscal sanctions are imposed. 42 U.S.C. § 603(i) (1982). The Secretary initially advised states that the failure to implement OBRA changes would not cause quality control errors until August, 1982, a year following its enactment.²¹ The Secretary subsequently modified this policy to allow states to "convert" cases to the new rules gradually.²² Until March of 1983, cases which had not been converted since the OBRA changes had been implemented were reviewed against the old AFDC rules for the purposes of identifying quality control errors,²³ despite the fact that the effective date of OBRA had long since passed.

If the Secretary could allow states to implement the OBRA changes gradually, effectively costing the federal government millions of dollars, surely the federal court could enjoin the Commissioner from recovering an overpayment from a single AFDC family.

OBRA also included an amendment to the AFDC statute requiring the collection of overpayments and the prompt payment of underpayments. Pub. L. No. 97-35, § 2318, 95 Stat. 357, 856-57 (1981) (codified at 42 U.S.C. § 602(a)(22) (Supp. III 1985)). There is nothing in the statutory language or the legislative history which indicates a congressional intent to limit the court's equitable power to fashion a remedy which might enjoin recoupment or reduce the amount to be recovered in a particular case. Thus, the statutory provision regarding overpayments does not provide grounds for reversing that part of

²¹ See HHS Action Transmittal SSA-AT-81-24 (August 26, 1981) (a copy of each of the HHS Action Transmittals cited herein has been lodged with the Clerk).

²² See HHS Action Transmittal SSA-AT-82-8 (May 20, 1982).

²³ See HHS Action Transmittal SSA-AT-83-4 (March 21, 1983).

the court's ruling directing that the Commissioner be enjoined from recovering the overpayment to Ms. Jenkins.

The situation presented in *Heckler v. Day*, 467 U.S. 104 (1984), is analogous to this case. In *Day*, the court of appeals had affirmed a class-wide injunction imposing time limits on the Secretary, and requiring that interim benefits be paid in the event of noncompliance. 467 U.S. at 109-10. In a five to four decision, this Court rejected the class-wide injunction, concluding that Congress had repeatedly rejected proposals for mandatory deadlines. *Id.* at 119. The Court emphasized, however, that its ruling did not restrict the equitable power of a federal court to fashion an appropriate remedy in an individual case. *Id.* n. 33. Thus, even if Congress had intended to prevent courts from enjoining recovery of overpayments on a class-wide basis, the relief afforded to Kathryn Jenkins would still be proper.

CONCLUSION

The judgment of the court of appeals, both as to the merits of the claim and as to the relief, should be affirmed.

November, 1987

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APPENDIX

(1a)

TABLE VI
AFDC
Case Activity
Fiscal Years 1982 through 1986

<u>Applications:</u>	<u>FY86</u>	<u>FY85</u>	<u>FY84</u>	<u>FY83</u>	<u>FY82</u>
Total Applications	51,112	49,485	49,276	48,675	56,302
Pending at start of fiscal year	672	448	476	497	576
Received during year	50,450	49,037	48,800	48,178	55,726
Total Processed Applications	50,657	48,813	48,828	48,199	55,805
Approvals	44,046	42,358	42,347	41,661	49,793
New	17,688	16,900	16,986	16,983	15,953
Reopenings	22,649	22,034	21,717	21,261	30,430
Transfers	3,709	3,424	3,644	3,417	3,410
Denials	6,611	6,455	6,481	6,538	6,012
Pending at end of fiscal year	465	672	448	476	497
Closings:					
Number of Closings	40,721	39,517	38,797	36,018	53,906
Ratio of approvals to closings	1.082	1.072	1.092	1.156	0.924

(2a)

TABLE XI
AFDC
Length of Time on Program*
June 1985

Years	Total Cases**	
	Number	Percent
00 — .99	19,168	38.4%
1.00 — 1.99	10,098	20.2
2.00 — 2.99	6,087	12.2
3.00 — 3.99	3,925	7.9
4.00 — 4.99	2,784	5.6
5.00 — 5.99	2,170	4.4
6.00 — 6.99	1,431	2.9
7.00 — 7.99	1,096	2.2
8.00 — 8.99	745	1.5
9.00 — 9.99	554	1.1
10.00 — 10.99	457	0.9
11.00 — 11.99	321	0.6
12.00 — 12.99	231	0.5
13.00 — 13.99	202	0.4
14.00 — 14.99	156	0.3
15.00 — 15.99	160	0.3
16.00 — 16.99	85	0.2
17.00 — 17.99	64	0.1
18.00 — 18.99	34	0.1
19.00 and over	104	0.2%
Total	49,872	100.0%

*Total cases eligible during month — Run #OD-0267.

**Less than 0.1%.

(3a)

TABLE XII
AFDC
Cases
Length of Time on Assistance
Since Last Opening Date
June, 1986 and June, 1985

Years	June, 1986		June, 1985	
	Number	Percent	Number	Percent
Less than 1	20,429	39.62%	19,168	38.43%
1	10,165	19.71	10,098	20.25
2	6,085	11.80	6,087	12.21
3	4,109	7.97	3,925	7.87
4	2,755	5.34	2,784	5.58
5	2,022	3.92	2,170	4.35
6	1,616	3.13	1,431	2.87
7	1,074	2.08	1,096	2.20
8	853	1.65	745	1.49
9	596	1.16	554	1.11
10	432	0.84	457	0.92
11	368	0.71	321	0.64
12	247	0.48	231	0.46
13	193	0.38	202	0.41
14	162	0.31	156	0.31
15	127	0.25	160	0.32
16	128	0.25	85	0.17
17	61	0.12	64	0.13
18	40	0.08	34	0.07
19+	103	0.20	104	0.21%
Total	51,565	100.00%	49,872	100.00%

*Total cases eligible on June 30, 1986 — Run #OD-0268.

TABLE III

AFDC(2)

Cases, Recipients and Net Payments
By Month and Segment
Fiscal Year 1986

	Grand Total			Regular (3)			Unemployed Parent		
	Cases	Persons	Payments	Cases	Persons	Payments	Cases	Persons	Payments
July 1985	51,692	153,152	\$ 21,358,546	43,345	118,050	\$ 16,417,219	6,963	30,703	\$ 3,888,089
August	52,249	154,952	23,163,288	43,948	120,038	18,190,973	6,927	30,628	3,926,873
September	52,273	154,925	23,588,548	44,111	120,432	18,632,529	6,898	30,574	3,956,729
October	52,341	154,992	23,638,716	44,191	120,605	18,723,270	6,890	30,550	3,859,960
November	52,523	155,622	24,007,088	44,379	120,804	19,108,643	7,004	31,110	4,012,094
December	53,194	158,210	24,213,389	44,701	122,108	19,091,258	7,372	32,730	4,220,023
July-December 1985	314,272	931,853	139,969,579	264,675	722,037	110,163,892	42,054	186,295	23,863,768
Monthly Average (1)	52,379	155,309	23,328,263	44,113	120,340	18,360,649	7,009	31,049	3,977,295
January 1986	53,776	160,860	24,467,454	44,911	122,721	19,219,117	7,714	34,664	4,371,954
February	54,409	162,269	24,789,221	45,282	123,504	19,357,040	7,990	35,356	4,541,638
March	54,974	164,393	25,166,528	45,563	124,384	19,531,075	8,244	36,446	4,670,658
April	55,679	166,756	25,108,396	46,011	125,694	19,261,518	8,386	37,156	4,758,129
May	54,955	164,917	24,466,620	45,462	124,737	18,720,463	8,210	36,312	4,580,103
June	54,739	163,427	22,471,129	45,685	124,781	16,963,095	7,817	34,691	4,452,644
January-June 1986	328,532	982,622	146,348	272,914	745,821	113,052,328	48,361	214,625	27,375,125
Monthly Average (1)	54,755	163,770	24,411,558	45,486	124,304	18,842,055	8,060	35,771	4,562,521
FY 1986									
Total Cumulative	642,804	1,914,475	286,438,927	537,589	1,467,858	223,216,220	90,415	400,920	51,238,894
FY 1986 Total									
Monthly Average (1)	53,567	159,540	23,869,911	44,799	122,322	18,601,352	7,535	33,410	4,269,908

(4a)

REPLY

BRIEF

(12)
No. 86-978

Supreme Court, U.S.
FILED

DEC 10 1987

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

SANDRA GARDEBRING, Commissioner of the
Minnesota Department of Human Services,
Petitioner,

vs.

KATHRYN JENKINS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. UNDER THE LOWER COURT'S DECISION, STATES CANNOT KNOW WHAT NOTICE IS REQUIRED BY FEDERAL LAW OR WHETHER THE STATES HAVE EFFECTIVELY IMPLEMENTED FEDERAL AND STATE ELIGIBILITY REQUIREMENTS.

The brief of Respondent Jenkins graphically illustrates why Minnesota, 28 other states and the Secretary of Health and Human Services ("HHS") are so concerned about the decision of the court of appeals. Plaintiffs concede that not every eligibility rule must be explained in writing and that the

lower court's decision may create "gray areas," but argue that the "possibility of gray areas does not justify reversing the decision of the court of appeals." Resp. Br. 24, 26-27. To the contrary, the uncertainty resulting from the lower court's unjustifiably expansive reading of 45 C.F.R. § 206.10(a)(2)(i) renders it impossible for any state to effectively administer the AFDC program. Under this decision, no state can know whether it has effectively implemented the eligibility conditions of state and federal AFDC laws until the state's implementation is challenged after the fact.

The lower court's decision creates at least three areas of uncertainty. First, which of the many eligibility requirements of the AFDC program are so crucial, or have such drastic effects, that a state will be unable to implement the requirements without providing advance individual notice to recipients? Second, if the regulation requires this advance notice to recipients, in addition to applicants, when and how often must this notice be given? Third, what information must a notice contain in order to be sufficient? Unless a state knows the answers to each of these questions, states will be under a constant threat of having a federal court enjoin the implementation of eligibility requirements, *post hoc*, because the court disagrees with the state's policy judgments.

Attempts to pass off these issues as minor "gray areas" are too glib. As this case illustrates, the consequences are severe if a state guesses wrong about what a court will later require. Here, years after Minnesota's implementation of Congress' lump-sum statute, the court of appeals held that Minnesota had "failed to institute a legal change in its eligibility rules." Pet. App. A21.

Plaintiffs assert that the states' fear that the holding in this case will be extended to other eligibility rules is unwarranted.

However, the state amici assert that the notice defense arising from this case is now raised "against a wide variety of federal eligibility rules." Amicus Br. of States Hawaii, *et al.*, at 3. Already since the lower court decision, at least one appellate court has applied the section 206.10 defense in a non-lump-sum case. *Pond v. Department of Health and Rehabilitative Services*, 503 So. 2d 1330 (Fla. App. 1 Dist. 1987) (citing lower court decisions in this case, court held AFDC vendor-payment provision not enforceable under section 206.10(a)(2)(i) where state failed to give advance notice of the provision). Moreover, in AFDC administrative appeals in Minnesota, the lack-of-notice defense has been asserted with respect to at least eight different eligibility requirements (other than the lump-sum statute) since the district court decision in this case.¹ Thus, plaintiffs wrongly assert that the section 206.10(a)(2)(i) notice defense will not be raised in many other contexts.

Plaintiffs argue that, while the regulation may not require detailed advance notice of all eligibility requirements, it does

¹ The notice defense has been raised, specifically citing section 206.10(a)(2)(i), with respect to the following AFDC program requirements: Right to reapp'y for benefits while appeal is pending (*Brenda Jones v. Minnesota Dept. of Human Services, et al.*, Minn. Dist. Ct. File No. 482405 (Nov. 3, 1987); effect of late filing of household report form (Admin. Dkt. No. 12171, Dec. 23, 1985); effect of deregistration from work incentive program (Admin. Dkt. No. 10844, May 29, 1984); operation of retrospective budgeting (Admin. Dkt. No. 12154, Oct. 8, 1985). In other contexts, the notice defense has been raised without citation to the regulation: 100-hour rule for unemployed parent status (Admin. Dkt. No. 12748, Nov. 3, 1986); income during month of marriage (Admin. Dkt. No. 15549, Nov. 19, 1987); effect of direct support payments (Admin. Dkt. No. 13455, Apr. 2, 1987); work incentive registration required to complete application (Admin. Dkt. No. 12350, Mar. 31, 1987); borrowed money treated as resource (Admin. Dkt. No. 13273, Jan. 8, 1987). Copies of these decisions, with identifying information deleted, have been lodged with the clerk.

require specific notice of the lump-sum statute. If the lump-sum statute is an exception to the general rule that notice of specific eligibility rules is not required by section 206.10(a)(2)(i), then the exception should be explicitly stated in federal statute or rule. States should not be left to speculate. It may be reasonable for Congress or HHS to mandate individual advance notice of specific eligibility requirements, to specify what persons must be provided such notice, and to specify the form and timing of such notices. However, neither Congress nor HHS has done so here.

Such decisions are matters of policy. Plaintiffs openly invite the Court to impose its own (or plaintiffs') views of wise administration of the AFDC program. Plaintiffs assert that reasonable persons may differ "about the wisdom of requiring advance notice" of some AFDC requirements, but not about the lump-sum statute. Resp. Br. 26. As noted in the State's original brief, such decisions regarding wise policy are vested not in the Courts, but in Congress and in the agencies which administer the program. See Pet. Br. 28.

II. THE LOWER COURT'S RULING WAS BASED UPON AN INCORRECT INTERPRETATION OF 45 C.F.R. § 206.10(a)(2)(i).

A. The Federal Regulation Does Not Require Notice Of Specific Eligibility Requirements Such As The Lump-Sum Statute.

The states and HHS assert that section 206.10(a)(2)(i) does not require advance notice of individual eligibility requirements affecting few recipients. Instead, as found by Judge Fagg dissenting in the court of appeals, "the regulation simply requires the State to publicize generally in written

form, and orally as appropriate, the AFDC program and its availability." Pet. App. A24.²

Plaintiffs argue that section 206.10(a)(2)(i), when read together with the lump-sum statute, requires a specific written explanation of the lump-sum provision. Resp. Br. 13. They assert that "Congress must have anticipated" that written information concerning the lump-sum statute would be provided to AFDC recipients. *Id.*, 27. This attempt to read between the lines of OBRA to divine a Congressional intent to require notice to recipients before they would be subject to the lump-sum statute should be rejected. If Congress had intended to require notice of the lump-sum statute prior to implementation, it could have expressly done so. It did not.

Plaintiffs also argue, for the first time, that the lump-sum statute is among the "responsibilities" of recipients which must be described in the written materials provided pursuant to section 206.10(a)(2)(i). The lump-sum statute does not impose responsibilities within the meaning of the regulation.

The AFDC program expressly places certain affirmative responsibilities on AFDC applicants and recipients. Minnesota's AFDC pamphlet contains examples of such responsibilities. The pamphlet states that the applicant must register with a jobs program and cooperate in the recovery of child support. Jt. App. A29. Compliance with such responsibilities is a condition of eligibility for AFDC. In contrast to these provisions, the lump-sum statute does not create a "responsibility" in any true sense. The AFDC program does not re-

² The federal district court for Hawaii has recently ruled that the regulation does not require individual notice of the lump-sum statute, adopting the reasoning of Judge Fagg's dissent. *Coakley v. Sunn*, Civ. No. 85-1233, slip op. at 6-7 (D. Hawaii, Sept. 17, 1987) (copy of slip opinion lodged with clerk).

quire an AFDC family to budget its lump-sum income in a prescribed manner. Instead, it imposes a period of ineligibility which remains the same whether or not the family budgets the money over the prescribed period.

Plaintiffs argue that notice of the lump-sum statute should be required because, they claim, the statute is unique in its application and severe in its consequences. However, plaintiffs and Amicus Economic Rights Task Force ("ERTF") concede that the effects of the lump-sum statute are minimized in Minnesota, not only by the minimal rate of recovery of overpayments, but also by the availability of Minnesota's General Assistance program to provide aid for families ineligible for AFDC benefits because of the lump-sum statute. Resp. Br. 41-42; Amicus ERTF Br. 19, n. 9. Thus, plaintiffs' assertion that the lump-sum statute would "leave dependent children destitute for months at a time," Resp. Br. 24, and amicus' statement that "affected families are left without subsistence income for months or years," Amicus ERTF Br. 19, are simply incorrect in this case. Moreover, *any* eligibility rule can result in a family losing benefits temporarily or permanently. The lump-sum statute affects relatively few AFDC recipients in Minnesota, Jt. App. A113-14, and even where it applies, it will usually affect benefits for only a month or two. Jt. App. A123-24.

The decision of the court of appeals, that a state must provide advance descriptions of specific eligibility requirements including the lump-sum regulation, is not supported by section 206.10(a)(2)(i), either alone or in combination with the lump-sum statute.

B. Section 206.10(a)(2)(i) Requires Only That Written Information Be Provided To Applicants, And Not Recipients.

Under its own clear language, section 206.10(a)(2)(i) applies only to applicants. The evident purpose of the regulation is to assure that applicants are provided basic information they need at the time of application. The lower court's decision attempts to turn the regulation into something much different—a vehicle for requiring notice to recipients of changed AFDC policies: "We think it crucial that AFDC recipients receive some form of advance notice of the changed policy toward lump sums and its operation." Pet. App. A10. Until now, the states have never been required to provide individual advance notice of law changes to AFDC recipients.

Plaintiffs offer a number of arguments that the regulation applies to recipients, as well as applicants. Plaintiffs first argue that the rulemaking history of a 1978 amendment to the regulation shows that section 206.10(a)(2)(i) is intended to apply to recipients, as well as applicants. However, the Secretary's statement quoted by plaintiffs does not support plaintiffs' argument, but rather refutes it. Contrary to plaintiffs' assertions here, the Secretary did not state that the regulation required information to be provided to all AFDC recipients. Instead, in response to a question, the Secretary said that information must be provided under the regulation to "those" recipients who seek such information. 43 Fed. Reg. 6,949, 6,950 (1978). This was the effect of the 1978 change.

Plaintiffs next argue that another provision of section 206.10 shows that the term "applicant" is used to refer to persons even after the completion of the application process. Plaintiffs refer to 45 C.F.R. § 206.10(a)(1)(iii) (1986), which provides that:

An applicant may be assisted, if he so desires, by an individual(s) of his choice (who need not be a lawyer) in the various aspects of the application process and the redetermination of eligibility[.]

A review of the rulemaking history of the quoted provision shows that HHS recognized the distinction between applicants and recipients and that the apparent inconsistency within the quoted provision was the result of agency inadvertence.

As originally proposed in 1970, the provision read:

An applicant or recipient may be assisted if he so desires by other individuals of his choice in the various aspects of the application process and the redetermination of eligibility[.]

35 Fed. Reg. 18,402 (1970) (emphasis added). However, when the provision was adopted several months later, the reference to "recipients" was omitted, even though the reference to "redetermination of eligibility" was retained. 36 Fed. Reg. 3,860, 3,864 (1971). The agency's explanatory comments continued to acknowledge the distinction between applicants and recipients, but did not explain the deletion of the term "recipients" from the text of the rule itself. The agency said:

In addition, notice of proposed rule making was published on December 3, 1970 (35 F.R. 18402), to provide that *applicants for and recipients of public assistance* may be accompanied by other individuals in their contacts with agency, if they so wish. After consideration of comments received, minor clarifying and editorial changes have been made.

36 Fed. Reg. 3,860 (1971) (emphasis added). Thus, even if the language now contained in section 206.10(a)(1)(iii) is confusing, it is clear that the Secretary has always recog-

nized the distinction between applicants and recipients. Moreover, the distinction between applicants and recipients is expressly noted in the regulation at issue here, section 206.10(a)(2)(i).³

Plaintiffs also argue that Minnesota must inform AFDC recipients of key eligibility rules in order to comply with section 206.10(a)(2)(ii) which requires each state to adopt procedures "to assure that recipients make timely and accurate reports of any change in circumstances which may affect their eligibility or the amount of assistance." There has never been a suggestion by the Secretary or the plaintiffs in this litigation that Minnesota has failed to meet this requirement. The requirement is met by use of forms which tell recipients what type of income and events they must periodically report. *See, e.g., Jt. App. A61.*

Plaintiffs argue that, even if section 206.10(a)(2)(i) does not require periodic notice of eligibility requirements to recipients, the court should nonetheless affirm the district court's order as an appropriate form of relief. Resp. Br. 14. This Court has repeatedly rejected the contention that courts have such extensive equitable powers. The Court has recognized that there are "fundamental limitations on the remedial powers of the federal courts," and that "[t]hose powers [can] be exercised only on the basis of a violation of the law and [can] extend no farther than required by the nature and

³ Plaintiffs object that the State's argument that section 206.10(a)(2)(i) does not apply to recipients is "made for the first time in this Court." Resp. Br. 8-9, 14, 20-21. The State first raised the argument in the court of appeals, which expressly decided the issue without objection by plaintiffs. *See* Pet. App. A9, A10 and A12. Moreover, the State raised this issue in its Petition for Certiorari, Cert. Pet. I, 11, again without objection by plaintiffs. Based upon these facts, "Respondent's attempt to avoid the question now comes far too late." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815 (1985).

the extent of that violation." *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 399 (1982), quoting from *Hills v. Gautreaux*, 425 U.S. 284, 293 (1976).

The lower court clearly erred in holding that section 206.10(a)(2)(i) applies to recipients, as well as applicants.

C. Even If Section 206.10(a)(2)(i) Requires Advance Notice Of The Lump-Sum Statute, Minnesota's September 1981 OBRA Informational Letter Provided Ample And Accurate Notice To Those Who Received It.

Plaintiffs continue to argue in this court that the State's September 1981 OBRA Informational Letter was not effective to provide adequate notice of the lump-sum statute. As explained in the State's initial brief, the OBRA letter provided a substantial amount of information about the lump-sum statute to recipients and advised them to contact their financial workers if they needed more information. Plaintiffs cannot avoid the fact that Respondent Jenkins, the only named plaintiff with standing to raise the notice issue, was a recipient in September, 1981 and did receive the letter.

Plaintiffs argue that the OBRA letter was inaccurate because, while it announced an effective date for the lump-sum statute of October 1, 1981, a later court injunction changed the effective date in Minnesota to February 1, 1982. Plaintiffs assert that "the Commissioner sent no additional information" concerning the subsequent change in effective date. Resp. Br. 29. Plaintiffs' statement is simply wrong. The State *did* send additional notices to persons who had been declared ineligible because of receipt of lump sums during the four-month period. See Pet. Br. A2-A5. The only reason Respondent Jenkins did not receive such a notice was that she did not report the lump sums she received during that period. She failed to report almost \$16,000 in lump sums received, even

though she signed and filed two monthly reporting forms which directly requested such information. Jt. App. A61, A120.

Since Jenkins received the September, 1981 letter, her claim that "[t]he Commissioner is fully responsible for the fact that the Jenkins family was unable to use the lump sum income to live on as Congress had intended," Resp. Br. 40-41, is unfounded. Contrary to the views of the lower courts, it is reasonable to require AFDC recipients to take some responsibility for their own situations.

D. The Assumption That Written Notice Is Always Effective Is Erroneous.

Before the district court's injunction, Minnesota did not routinely provide written notice of the lump-sum statute to applicants and recipients (except for the one-time 1981 OBRA letter). Minnesota believes that the federal regulations do not require routine notice, either oral or written, concerning each individual eligibility requirement. However, as explained in the State's initial brief, the State does provide a financial worker to each recipient to discuss the recipient's circumstances and to provide oral information about particular eligibility provisions which may affect the recipient.

Amicus Economic Rights Task Force correctly asserts that a policy of providing information orally will sometimes fail. But regular *written* notice will not assure that actual notice is provided to applicants and recipients in all cases. The goal of providing information is not simply to show that a written notice was mailed or delivered to the recipient—rather, the goal is to actually communicate information so that the recipient will have it at a time when it will be helpful. ERTF's assumption that written notice is always effective is based on erroneous premises—that the notices are always read, that they are always understood, and that they are always recalled

at the relevant times. None of these premises is borne out by practical experience. The affidavits from financial workers and AFDC administrators in this case show that regular written notices are generally not as effective as personal discussion with financial workers. Jt. App. A115, A119, A121-22.

III. THE LOWER COURT'S DECISION, THAT THE STATE COULD NOT IMPLEMENT THE LUMP-SUM STATUTE UNTIL IT HAD GIVEN NOTICE OF THE LAW CHANGE, CONTRADICTS THE DIRECT MANDATE OF CONGRESS.

The lower court held that the lump-sum statute could not be implemented in Minnesota until advance notice of the statute was provided, and that, consequently, the State was enjoined from recouping the amounts paid to Respondent Jenkins while she was ineligible because of the lump-sum statute. Plaintiffs incorrectly suggest that the State "exaggerates and misrepresents" the lower court's holding. Resp. Br. 15. The circuit court held:

[T]he payments to Jenkins cannot be considered an overpayment, because the defendant, having failed to provide adequate notice to Jenkins of the lump-sum rule, cannot properly invoke it against her. By failing to comply with the notice regulations, [the State] failed to institute a legal change in its eligibility rules.

Pet. App. A21.

This case squarely presents to the Court the issue of the permissible remedy if a state fails to adequately publicize a public assistance program requirement. In such a situation, is a recipient entitled to receive and retain AFDC benefits in direct contravention of the eligibility conditions established by Congress, as well as the federal statute requiring recovery of any overpayment?

Plaintiffs argue that the district court has broad equitable power to enjoin recoupment of overpayments in a particular case. However, absent a constitutional violation, the court's remedial power does not authorize it to ride roughshod over Congress' statutory enactments. A court may not order a particular remedy where Congress has "otherwise provided by statute." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). See also *Hedges v. County of Dixon*, 150 U.S. 182, 192 (1893) (courts of equity are "barred by positive provisions of statute equally with courts of law," and may not "disregard statutory and constitutional requirements"). In this case, the lower court lacked authority to order that Jenkins was entitled to receive and retain AFDC benefits during her Congressionally mandated ineligibility period, precisely because Congress had provided otherwise.

In order to remedy the asserted violation of the federal agency's regulation, the lower court suspended the operation of two federal statutes to which the regulation is necessarily subservient. The injunction against the recoupment of the overpayment to Jenkins contravenes 42 U.S.C. § 602(a)(17) (Supp. III 1985) which establishes the lump-sum statute as an eligibility requirement in Minnesota as of February 1, 1982, as well as section 602(a)(22), which requires the State to recoup from a recipient any amounts received which exceed the recipient's entitlement under the eligibility statutes.

It is significant that neither the statutes nor the Secretary's regulations provide, as a remedy for a state's failure to adequately publicize statutory eligibility requirements, that the eligibility requirements will not be applied according to their clear terms. The federal agency has "the primary responsibility for fashioning the appropriate remedy for violation of its regulations," *United States v. Caceres*, 440 U.S. 741, 756

(1979), and the Secretary agrees that he has not enacted the remedy imposed by the lower court. *See* U.S. Br. (merits), 24.⁴

Plaintiffs claim that the overpayment statute should not be applied to Jenkins for equitable reasons—because, they claim, the State erred in not providing Jenkins more frequent and detailed written notice of the lump-sum statute. But, the AFDC overpayment statute is in marked contrast to many other federal statutes. “A number of statutes authorizing the recovery of federal payments make an exception for cases that are ‘against equity and good conscience.’” *Califano v. Yamasaki*, 442 U.S. 682, 693-94, n. 9. (1979) (listing nine federal statutes authorizing waiver of recovery of overpayments for equitable reasons). The AFDC overpayment statute, section 602(a)(22), contains no such exception, a fact which has been noted by the Secretary in rulemaking proceedings:

Comment: One commentator suggested that we should not require states to recover overpayments that result from administrative errors.

Response: We do not believe that the statute permits exceptions to recovery nor does it differentiate based on the source of error. . . .

47 Fed. Reg. 5,648, 5,672 (1982).

In arguing that the lower court nonetheless had the authority to suspend the lump-sum and overpayment statutes, plaintiffs assert that OBRA had an “unusually flexible effective

⁴ In light of the limitations on the Secretary’s rulemaking authority, 42 U.S.C. § 1302 (Supp. III 1985) (Secretary may promulgate regulations “not inconsistent with” the federal statute), it might be questioned whether the Secretary could provide the remedy imposed by the court of appeals, even if he chose to do so. However, that question is not presented here.

date” and that the Secretary gave the states substantial leeway in implementing the OBRA amendments. Although OBRA established varying effective dates for different states and different provisions, depending on whether conforming state legislation was required, effective dates were anything but flexible. The HHS Action Transmittals cited by plaintiffs merely gave the states time to adjust individual cases and set aside the penalties which states might suffer if they failed to make the federal changes promptly and accurately. States were nonetheless required to make the changes effective on the dates prescribed by Congress, and amounts received by recipients after those dates which exceeded the recipients’ entitlements under the new eligibility rules were overpayments.

Lastly, plaintiffs argue that this court’s decision in *Heckler v. Day*, 467 U.S. 104 (1984), authorizes the relief ordered by the lower court here. Plaintiffs argue that, even if broad equitable relief would have been inappropriate, a narrow remedy relating to an individual recipient was still proper. Plaintiffs’ reliance on *Heckler* is misplaced. This Court in *Heckler* did not hold that injunctive relief for individual cases was appropriate, but only that it was not foreclosed by the decision. *Id.* at 119, n. 33. Moreover, there is nothing in *Heckler* to suggest that this Court authorized equitable relief, even for an individual recipient, which directly violates Congress’ statute.

Plaintiffs cite no prior decision of this Court requiring payments by an agency directly contrary to federal statute, as a remedy for inadequate notice of a statutory change. Even if the courts had authority to create that remedy, such an expansion of remedial powers would not be warranted by the

facts of this case. The effect of recouping the repayment from Jenkins is not unduly harsh.⁵

Here, even if the lower court correctly determined that the State was obligated to give more notice than it gave under 45 C.F.R. § 206.10(a)(2)(i), the lower court erred in holding that the State had not effectively implemented the lump-sum statute and that the State was barred from recouping overpayments received by a recipient.

IV. DUE PROCESS DOES NOT REQUIRE A STATE TO PROVIDE A RECIPIENT NOTICE OF AN INDIVIDUAL AFDC ELIGIBILITY REQUIREMENT BEFORE THE STATE IMPOSES THE REQUIREMENT ON THAT RECIPIENT.

In the district court, plaintiffs claimed that the due process clause, as well as the federal regulation, requires the State to provide recipients advance notice of the lump-sum statute. The district court did not reach the due process issue. Pet. App. A47. Plaintiffs now argue that, if this Court reverses the decision of the lower court based upon the regulation, the Court should remand the case for consideration of the due process issue. Amicus Economic Rights Task Force, while agreeing with plaintiffs concerning the need to remand, also presents argument in support of plaintiffs' due process claim.

Where, as here, the facts are undisputed, and the resolution of a point is clear, this Court may address and resolve issues not addressed below in the interests of judicial economy. *Allen v. State Bd. of Elections*, 393 U.S. 544, 554 (1969);

⁵The purpose of equitable relief in cases of economic loss is to make the aggrieved party whole. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419-20 (1975). The remedy provided by the lower court goes beyond making Jenkins whole. She is allowed to have the full benefit of the lump sum and receive AFDC benefits for the same period, a result clearly not intended by Congress.

Levin v. Mississippi River Fuel Corp., 386 U.S. 162, 169-70 (1967). See also *Lyng v. Payne*, 476 U.S. 926, 106 S.Ct. 2333, 2343 (1986) (Court addressed plaintiffs' due process challenge to adequacy of notice of loan program, even though lower courts had not). Consequently, this Court should consider and reject plaintiffs' due process claim.

ERTF argues that due process requires that advance notice of the lump-sum statute be provided to a recipient before the recipient receives a lump sum which will affect his or her eligibility. This Court's decision in *Atkins v. Parker*, 472 U.S. 115 (1985), is dispositive of plaintiffs' due process claim.

ERTF's argument is based on a misconception of the requirements of due process. ERTF asserts that "the lump sum rule plainly acts to deprive persons of substantial interests in property." ERTF Br. 25. Contrary to ERTF's argument, the federal AFDC statute does not deprive any person of a property interest the person would otherwise have. Instead, it is the AFDC statute which creates the property interest in AFDC benefits. In OBRA, Congress reduced the level of property interest for certain persons who would be affected by the lump-sum statute and OBRA's other eligibility changes. But such a benefit reduction does not implicate due process interests.

This issue was squarely addressed in *Atkins*, where this Court considered recipients' due process claims relating to OBRA reductions in their food stamp benefits. The Court said:

The congressional decision to lower the earned-income deduction from 20 percent to 18 percent gave many food-stamp households a less valuable entitlement in 1982 than they had received in 1981. But the 1981 entitlement did not include any right to have the program continue indefinitely at the same level, or to phrase it another way, did not include any right to the maintenance of the same

level of property entitlement. . . . "[A] welfare recipient is not deprived of due process when the legislature adjusts the benefit levels. . . ."

Id. at 129-30 (footnote omitted). *See also id.* at 146 (Brennan dissenting).

Thus, after the 1981 OBRA amendments, AFDC recipients' only due process interest in their AFDC payments was to receive the correct amount of benefits under the amended law. In this case, there is no suggestion that the State applied the lump-sum statute erroneously to the plaintiffs, nor that the State failed to provide sufficient due process notice and hearing rights when the lump-sum statute was applied to individual recipients.

In *Atkins*, this court said that "[a]ll citizens are presumptively charged with knowledge of the law." 472 U.S. at 130 (citation omitted).⁶ The court noted, "Arguably that presumption may be overcome in cases in which the statute does not allow a sufficient 'grace' period to provide the persons affected by a change in the law with an adequate opportunity to become familiar with their obligations under it." *Id.* However, even if the requirement of sufficient opportunity to become familiar with the law applied here, recipients in Minnesota had ample opportunity, in several ways, to become familiar with the requirements of the lump-sum statute before it affected their benefit levels.

Initially, like all citizens, AFDC recipients had notice of the lump-sum statute by virtue of the statute itself. Congress passed the lump-sum statute some five and one-half months before it became effective in Minnesota on February 1, 1982

⁶ This presumption is applied even to criminal statutes, where it has often been held that "ignorance of the law is no excuse." *See e.g., United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 562-63 (1971).

and more than two years before the named plaintiff, Respondent Jenkins, received the lump-sum payment at issue here. This Court has held:

It has long been established that "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," but it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights.

Texaco, Inc. v. Short, 454 U.S. 516, 535-36 (1982).

Moreover, notice of the requirements of the lump-sum statute, as well as the Secretary's regulations to implement the statute, were published in the Federal Register before the statute became effective in Minnesota and again before Jenkins received the lump sum involved here. *See* 46 Fed. Reg. 46,750 (1981); 47 Fed. Reg. 5,648 (1982). Such publication in the Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it," 44 U.S.C. § 1507 (1982), and is "more than ample to satisfy any due process concerns." *Lyng v. Payne*, 106 S. Ct. at 2343.

In addition to the words of the law itself and the notice in the Federal Register, Minnesota AFDC recipients had other means to become familiar with the lump-sum statute. Each recipient was assigned to a financial worker who could provide information to the recipient and answer questions the recipient might have about the program.⁷ Local agencies were

⁷ In *Texaco, Inc. v. Short*, 454 U.S. 516, 550 (1982), Justice Brennan, dissenting, specifically noted that public assistance recipients are responsible to make inquiries regarding the rules of the program. Contrasting a private interest (in that case mineral interests in property) and a statutory public assistance entitlement, he said: "The mineral interest owner has no reason to anticipate an occasion for state assistance, and thus no reason to monitor the ground rules upon which the State conditions its aid."

required to have program materials available to applicants and recipients at those offices. 45 C.F.R. § 205.70 (1986). Such resources and materials clearly are not available to citizens affected by most laws. Finally, Respondent Jenkins and other persons who were recipients of AFDC in Minnesota at the time OBRA was passed received individual notice alerting them to the changes in the lump-sum statute.

Certainly any due process interests applicants and recipients might have in becoming aware of AFDC eligibility requirements are more than satisfied here.

CONCLUSION

Petitioner requests that this Court reverse the judgment of the court of appeals.

December, 1987.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(10)

No. 86-978

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

SANDRA GARDEBRING, Commissioner of the
Minnesota Department of Human Services,
Petitioner

v.

KATHRYN JENKINS, Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE
ECONOMIC RIGHTS TASK FORCE,
NATIONAL LAWYERS GUILD
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INTEREST OF THE AMICUS

This brief is submitted on behalf of the Economic Rights Task Force of the National Lawyers Guild. The National Lawyers Guild is a legal organization of over 8000 attorneys, legal workers, law students, and jailhouse lawyers. The Economic Rights Task Force (ERTF) serves as a focus of the Guild's work in areas of economic rights -- welfare, housing, food, health and jobs. Most of its members are actively involved in providing representation to low-income persons on basic economic issues, and many of its members are particularly involved in work concerning the welfare system.

The ERTF has an interest in this case both because its members represent welfare recipients, and because its membership is deeply concerned about the ways in which the failure to tell applicants and recipients about the AFDC lump sum rule results in catastrophic consequences for low income

families. When families are terminated from AFDC without advance notice of the lump sum rule, they face months or years with no source of subsistence income. They risk hunger, eviction, utility shut-offs, and homelessness.

Minnesota and the federal and state amici offer the Court an idealized view of AFDC administration, in which case workers provide prompt and complete oral notice of program rules at all appropriate times. Amicus wishes to present a more accurate depiction of the practical realities of the welfare system, and the problems that result for AFDC applicants and recipients if states are not required to give written notice of the lump sum rule before the rule is applied to disqualify families from aid.

SUMMARY OF ARGUMENT

The lump sum rule is not merely a rule describing a term of AFDC eligibility and benefits. Rather, the rule expects a specific behavior from affected recipients.

Its very purpose is to encourage recipients to save and budget lump sums, and use the funds in lieu of AFDC benefits. Its purpose is defeated when recipients are not given notice of the rule in time to affect their behavior.

In construing 45 C.F.R. §206.10(a)(2)(i), the Court should not be influenced by Minnesota's assurance that absent a requirement of written notice, workers will provide timely oral notice of the lump sum rule. Neither Minnesota nor its amici say states are required to give oral notice of the rule before the family is disqualified from aid. Moreover, oral notice, even if required, would be inadequate. As a practical matter, a program relying on oral notice will often fail to inform people of the lump sum rule.

Citing Atkins v. Parker, 472 U.S. 115 (1985), Minnesota and its amici assert that people are presumed to know the law. But the premise of Atkins does not apply here.

In contrast with the legislation at issue in Atkins, the lump sum rule depends on recipient awareness to effectuate its purpose. The basic goal of the AFDC program is defeated when indigent families are made ineligible for AFDC without being given timely notice to use their lump sum in lieu of the discontinued AFDC benefits. Due process requires that persons be informed of the rule in time to adjust their behavior in accordance with Congressional intent.

ARGUMENT

- I. UNDER THE CONSTRUCTION OF 45 C.F.R. §206.10(a)(2)(i) OFFERED BY MINNESOTA AND ITS AMICI, AFDC RECIPIENTS MAY NEVER BE TOLD ABOUT THE LUMP SUM RULE UNTIL THEY ARE TERMINATED FROM AID.

Under Minnesota's construction of 45 C.F.R. §206.10(a)(2)(i), a state has no duty to tell an AFDC family about the existence of the lump sum rule until the rule is applied to disqualify the family from assistance for months or years. The

state seeks to downplay the harsh consequences of its regulatory construction by assuring the Court that caseworkers provide oral notice of the rule whenever appropriate. Perhaps Minnesota believes the Court will be more willing to hold 45 C.F.R. §206.10 imposes no duty to provide written notice of the lump sum rule if the Court is reassured that states will provide oral notice.

Though Minnesota contends it provides oral notice at appropriate times, its construction of 45 C.F.R. §206.10(a)(2)(i) would permit states to operate AFDC programs without ever telling applicants and recipients about the lump sum rule until the moment of disqualification. Moreover, in the day-to-day world of AFDC administration, even a state's good faith assurance of oral notice cannot possibly be an adequate substitute for advance written notice of the rule.

A. Neither Minnesota nor its amici contend states are required to give oral notice of the lump sum rule.

There is a gulf between Minnesota's description of its practice and its construction of 45 C.F.R. §206.10(a)(2)(i). While the state's brief relies heavily on its assurances of oral notice, the state never says oral notice is required by 45 C.F.R. §206.10(a)(2)(i).

Minnesota suggests it does not wish to burden AFDC applicants and recipients with written notice of the lump sum rule. It raises the specter of "deluging applicants and recipients with detailed written notices about numerous eligibility requirements." Br. at 28. Minnesota asserts that the state prefers to provide "financial workers who can answer questions for applicants and recipients about lump sum income and other changes in a recipient's financial or family circumstances." Br. at 27. In describing its policy choice, the state does not contend it is required to

give oral notice; it merely says its caseworkers do so.

The State amici avoid even the minimal representations offered by Minnesota. They merely assert that "welfare recipients, like all other citizens, are 'presumptively charged with knowledge of the law.'" Brief of State Amici, at 14, citing Atkins v. Parker, 472 U.S. 115 (1985). They do not claim they can or do routinely provide oral advice to recipients about program rules.

Nor does the United States contend that the law requires states to tell recipients about the lump sum rule at any time prior to disqualification. On first reading the Amicus Brief of the United States, one may be left with the impression that the Secretary of Health and Human Services requires oral notice of the lump sum rule when a recipient reports actual or imminent receipt of income. In fact, the Amicus Brief contains no such statement. It says states must provide written or oral

notice of the duty to inform caseworkers of changed circumstances. Br. of United States, at 16, n.10. It never says caseworkers have a duty to inform applicants or recipients about the lump sum rule at any time.

In short, while the state and its amici emphasize the purported advantage of oral over written notice of the lump sum rule, they carefully avoid offering a construction of 45 C.F.R. §206.10(a)(2)(i) under which either form is required. Their real argument is that a regulation requiring states to provide written information about conditions of eligibility and rights and obligations of recipients should be construed to allow states to provide no notice at all of the lump sum rule, despite the fact that absent such notice, a family may be left completely indigent for months or years.

B. A Promise of Oral Notice cannot adequately inform AFDC families of the lump sum rule.

Even if an alternative requirement for oral notice could be read into 45 C.F.R. §206.10(a)(2)(i), the Court should reject such a construction. For a number of reasons, the Court should not take seriously the notion that a promise of oral notice can ever be an adequate substitute for a system of written notice in the day-to-day world of AFDC administration.

First, the underlying premise of relying on oral notice seems to be that recipients will report all relevant changes in face-to-face encounters or by telephone. The premise is wrong. Recipients are certainly never told they must or ought to report orally instead of in writing. In practice, many families living on subsistence AFDC grants cannot report changes by face-to-face encounters because they cannot afford to travel to the AFDC office every

time they have a change to report.¹ If they can get to the AFDC office, their worker may or may not be available. Many families cannot report by telephone because they can't afford to have a telephone.² If they have a phone, they routinely face telephone lines to welfare offices that are

¹ Federal law does not require states to set AFDC payment levels based on the actual subsistence needs of recipient populations. Rosado v. Wyman, 397 U.S. 397, 413 (1970). Accordingly, AFDC benefits are far below the poverty level in many states. For example, the federal poverty level for a family of three is currently \$9300, or \$775 per month. 34 Fed. Reg. 5340-41 (Feb. 20, 1969). No state pays that amount in AFDC benefits. 41 states pay less than \$400 per month for a family of three. 11 states pay less than \$200 per month for a family of three. Characteristics of State Plans for Aid to Families with Dependent Children, U.S. Dept. of Health and Human Services (1987 Edition), at 404.

Federal law does not specify the components that must be in a state standard of need. Only 27 states have any allowance at all for transportation in their state standard of need. Characteristics, supra, at 391.

² Only ten states provide allowances for telephone costs in their state standard of need. Characteristics, supra, at 391.

busy throughout the day, and workers that are unavailable when they call.

If the family has the choice, they may nevertheless prefer to report changes in writing, to avoid any possible dispute over what was reported or when it was reported. Indeed, much interaction between worker and client is not oral at all. Rather, the recipient sends in a report of a change,³ and the worker sends back a Notice of Action adjusting or terminating the grant. There is no occasion for oral interchange in the ordinary course of events.

Even if workers immediately give correct advice in response to report of a lump sum, many recipients will still not

³ Pursuant to 42 U.S.C. §602(a)(14), states must require all recipients with earned income or recent work histories to submit written monthly reports of income, family composition, and other relevant circumstances. Fourteen states impose a monthly reporting requirement on all recipients, and twenty-eight other states extend monthly reporting requirements to at least some other categories of recipients. Characteristics, supra, at 385-86.

get timely notice of the rule because of the nature of the AFDC change reporting system. States do not direct recipients to report a change on the day the change happens. For example, in Minnesota, recipients are told to report changes within ten days, or on a form to be filed by the eighth day of the next month. Minn. AFDC Program Manual §II-B(i). The reasonable implication of this requirement is that one is following program rules and not proceeding at risk so long as one reports within the time period.⁴ Given the

⁴ Recipients have no reason to assume the lump sum rule exists. For the first 46 years of the AFDC Program, the program had no such rule. In addition, the rule is unique to the AFDC Program. Many AFDC recipients also receive Food Stamps. The Food Stamp Program has no lump sum rule. See 7 C.F.R. §273.8. AFDC recipients are automatically eligible for Medicaid. 20 C.F.R. §435.110. There is no lump sum rule in the Medicaid Program. See 42 U.S.C. §1396a(a)(17)(B) (requiring that only available income be considered); 45 C.F.R. §435.113 (requiring states to provide Medicaid to persons who would be eligible for AFDC but for an AFDC eligibility condition prohibited by Medicaid).

sub-poverty levels of AFDC payments, see n.1, supra, recipients face strong pressures to spend their lump sum income on the needs that are never met by AFDC grants.

But if a lump sum recipient spends some or all of the funds during the period allowed for reporting, she risks months or years of AFDC ineligibility even though the lump sum has been partially or fully spent. This is an inevitable consequence if workers are not required to tell recipients about the lump sum rule until the recipient reports receipt of a lump sum.⁵

Even if a recipient reports a change the day it happens, there are severe problems with relying on oral notice. The

⁵ Accordingly, the assertion by the United States that recipients should be able to budget their monies in the manner intended by the unless they ignore the instruction to promptly report changes, Brief of United States at 20-21, is erroneous. Recipients can suffer irreversible damage by spending the lump sum funds during the period allowed for reporting.

best caseworkers make mistakes.⁶ Mistakes are much more frequent and much harder to correct in a program dependent on oral notice. When a drafter of written notice makes an error, there are opportunities for other administrators to review the draft and correct any errors before distributing the notice. On the other hand, when a caseworker in an oral encounter provides

⁶ The District Court observed that plaintiffs had submitted evidence that in at least some cases, recipients were not informed of the lump sum rule until the agency sent notice terminating their aid. Pet. App. 51.

For example, affiant Joyce Olson received social security benefits for her child on or about June 6, 1983, and reported the receipt to her worker on or about June 8. The worker did not advise her of the lump sum rule until written notice of termination was sent on or about July 8. J.A. at 106-07.

Kathryn Jenkins' worker indicated it was her normal practice to advise recipients about the lump sum rule, but she didn't specifically recall whether she advised Ms. Jenkins. J.A. at 121. The administrative hearing found that the Jenkins' were not advised of the rule at any time before November 2, 1993. J.A. at 70. On that date, Ms. Jenkins reported the lump sum and was told of her disqualification from AFDC assistance.

misinformation, there is no opportunity for anyone to review, correct, or even learn that misinformation was provided until after it has caused harm.

A number of factors increase the likelihood that caseworkers will sometimes give incorrect oral advice. Welfare workers have high caseloads. They have limited training. They must work with the same complex structure and multitude of rules and rule changes that face program recipients. Indeed, in the situation of the lump sum rule, where longstanding rules are changed and advice that was once correct becomes wrong, the oldest and most experienced caseworkers may be most subject to making good faith errors.

Amicus has attached to this brief an administrative hearing decision that graphically illustrates the possibility and impact of oral misinformation. (Appendix

A).⁷ In California State Hearing No. 85186177, the claimant began receiving AFDC for herself and her three children in April 1985. She told her worker she expected to receive accumulated pension funds from her former employer. The worker told her to call when she got the funds. She called on June 3, the first working day after she received the accumulated fund of \$5,242.81. She was told her worker had been changed. She called the new worker, and he told her he did not know yet what advice to give. She called three days later, and then four days later, holding the funds the entire time. The worker then told her he had consulted his supervisor, and that the fund was "windfall earnings" which could be used to pay debts and living expenses. The worker incorrectly told her she could

⁷ Amicus has deleted the claimant's name and other identifying information to preserve the claimant's privacy and right of confidentiality. 45 C.F.R. §§205.10(a)(19), 205.50.

reapply for AFDC as soon as her resources fell below \$1000. The worker specifically told her she could use the money to pay back rent and pay a retainer to a lawyer for a will contest. She did so, documenting all her expenditures with receipts.

On June 20, she called the worker to state she had used the pension monies to pay debts, had receipts for all expenses, and wanted an appointment to redetermine eligibility. The worker called back and left a message telling her the initial advice was wrong, and she would be ineligible for AFDC for eight months. With one modification, the administrative decision affirmed this result.⁸

This example demonstrates some practical realities about oral notice. It is

⁸ California has a state-funded program that provides AFDC benefits for three months to certain families ineligible under federal law. Calif. Welf. & Inst. Code §11200 et seq. The hearing decision directed the county to determine the claimant's eligibility under this state program.

unreliable because workers change. It is unreliable because workers are often unavailable when recipients call for advice. Most fundamentally, it is unreliable because even a careful worker checking with a supervisor can make a mistake. When that mistake happens, the entire burden falls on the indigent family. As state amici emphasize, Br. at 14, principles of equitable estoppel have very narrow application to governmental misadvice. And, HHS asserts that the lump sum statute also provides no relief in such circumstances. The statute provides for shortening a disqualification period if income has become unavailable for reasons beyond the family's control. 42 U.S.C. §602(a)(17). According to HHS, worker misadvice is not considered a circumstance beyond the control of the recipient. Brief of United States, at 22, n.15. Therefore, when workers provide wrong information about the lump sum rule, they may be more careful

next time, but the affected families are left without subsistence income for months or years.⁹

We agree caseworkers should not be expected to be mind-readers. Brief of State Amici, at 12. Neither should recipients. Providing recipients advance written notice is the only way to prevent a system where recipients must guess which questions to ask, and caseworkers must guess which information is relevant. It is the only

⁹ Minnesota emphasizes that families disqualified from AFDC because of the lump sum rule may be eligible for comparable payments under the state's General Assistance program. Minn. Br. at 27, n.13.

This ameliorating factor does not exist in much of the country. There is no federal requirement that states operate a general assistance program. Seventeen states have no general assistance program at all. See Social Security Bulletin, Aug. 1987, Vol 50, No. 8, Table M-30. Where states or localities have programs, they often have restrictive eligibility terms and a very limited number of recipients. For example, in August 1985, in addition to the seventeen states with no program, eighteen other states had general assistance programs with fewer than 5,000 recipients. Social Security Bulletin, Supra, at Table M-30.

way to prevent catastrophes for families that will inevitably sift through the large holes in a system where only oral notice is provided.

In summary, the Court should not conclude that oral notice offers a reasonable middle ground between the claim that recipients need written notice and the position that they are entitled to no notice at all. For many recipients, a promise of oral notice will mean no notice or wrong notice.

II. DUE PROCESS REQUIRES THAT STATES GIVE NOTICE OF THE LUMP SUM RULE.

Minnesota and its amici deny that AFDC families have any due process right to notice of the lump sum rule before the families are disqualified.¹⁰ They rely on

¹⁰ Respondent has suggested that if the Court rejects her regulatory argument, the case should be remanded to the Court of Appeals for a determination of constitutional questions. Amicus agrees with this approach. These comments concerning the applicability of due process protections are offered in case the Court chooses to
(continued...)

language in Atkins v. Parker, 472 U.S. 115 (1985) that persons are deemed to know the law. Brief of Minn. at 29; Brief of States at 6; Brief of United States at 20-21.

The states and the United States misread Atkins. Atkins does not hold that the government never has a duty to tell affected persons what the law is. The case holds that food stamp recipients had no greater right to advance notice of a legislative change than other voters. 472 U.S. at __, 105 S.Ct. at 2530. Minnesota misconstrues this holding as a statement that government need never tell affected persons about the existence of a law. Minn. Br. at 29-30. In fact, the intent of the Court's statement about advance notice of legislative change is elucidated by the immediately following footnote in the opinion, which cites Bi-Metallic Investment

¹⁰(...continued)
address due process concerns by way of guidance to the lower court.

Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). Bi-Metallic held that citizens of Denver were not entitled to notice and a right to be heard when a Board of Equalization was contemplating a uniform increase in tax assessments. Bi-Metallic stands for the proposition due process doesn't entitle people to advance notice that a bill is pending before a legislative body. The case does not stand for the proposition that governments never need to tell affected citizens after a law has been passed.

The lump sum rule is fundamentally different from the rule at issue in Atkins, and from most conditions of AFDC eligibility because it expects a specific responsive behavior from program recipients. Most rules merely describe conditions of eligibility. If a family meets the condition, they may be eligible for aid; if they do not meet the condition, they are ineligible. For example, the rule at issue in

Atkins - that an 18% deduction from earned income would be allowed instead of a 20% deduction - did not call for any particular behavior, and did not rely on a presumption of knowledge to effectuate its purpose.

In contrast, the very purpose of the lump sum rule is to affect recipient behavior. When Congress provided for a period of ineligibility after receipt of a lump sum, its goal was not to deny aid to needy families. Rather, Congress' intent was to encourage families to save the lump sum to use in lieu of AFDC during a period of ineligibility. This is not simply an instance where awareness of a law might help an individual plan particular transactions. The entire rationale of the rule depends on recipients being aware of its existence before they get and spend a lump sum. Without notice, the family risks being ineligible for AFDC, and with no substitute resources to meet subsistence needs. It is not just that notice effec-

tuates congressional intent; the lack of notice defeats congressional intent. A group of needy children Congress identified for assistance in the AFDC statute, and temporarily disqualified because of the presumed availability of the lump sum, are left without any public or private resources to meet their needs.

This Court may recognize, consistent with Atkins, that in limited circumstances, government has a duty to inform persons of a rule intended to affect their behavior. See Atkins, 472 U.S. at ___, 105 S.Ct. at 2530, n.34. In Atkins, the Court observed that recipients had a 90 day grace period and individual written notice of the law at issue. Thus, the Court explained, the Atkins plaintiffs could not prevail under the formulation offered by Justice Brennan in dissent in Texaco, Inc. v. Short, 454 U.S. 516, 544 (1982):

If it is to survive the scrutiny that the Constitution requires us to afford laws that deprive persons of substantial interests

in property, an enactment that relies on that presumption of knowledge must evidence some rational accommodation between the interests of the State and fairness to those against whom the law is applied.

105 S.Ct. at 2530, n.34.

Here, the lump sum rule plainly acts to deprive persons of substantial interests in property, and the presumption of knowledge is central to the very operation of the rule. The whole point of the rule is to affect recipient behavior. Under such circumstances, it is not enough for the state to keep repeating the maxim that persons are deemed to know the law. This legal fiction may be necessary as a general rule. Fairness requires that when Congress intends and expects indigent families to shape their behavior in accordance with a rule, and where the state can easily provide that notice, the notice must be given.¹¹

¹¹ The Amicus Brief of the United States, at 14, observes: "Fairness requires (continued...)"

If there is any circumstance where due process mandates people be told about a rule, the lump sum rule presents that situation.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted.

EVELYN R. FRANK
Counsel of Record

MARK H. GREENBERG

October 12, 1987

11(...continued)
that individuals be given some way to learn about the program and to comply with its requirements." However, the brief never identifies the way that recipients will be informed about the lump sum rule before they are disqualified from aid.

APPENDIX A

CALIFORNIA DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Hearing of Claimant
E. O.

State Hearing No. 85186177 ST CL
Hearing Officer: David Gilson
County Representative: Suzanne Collette
Authorized Representative: None
Place: San Jose
Date of County Notice: May 20, 1985
State Hearing Filing Date: June 26, 1985
Date of Hearing: August 2, 1985
Aid Paid Pending: Yes

DECISION OF THE DIRECTOR

Based on the evidence submitted, the Hearing Officer prepared a proposed decision. The Director of the Department of Social Services (DSS), being dissatisfied with the result, renders the following decision.

ISSUE

The issue is whether on June 20, 1985, Santa Clara County correctly proposed to discontinue claimant's Aid to Families with Dependent Children (AFDC) effective July 1, 1985, on grounds she had received a lump sum payment of income which would render her ineligible for a period of eight months through February 1986, where claimant spent the sums on county advice.

FINDINGS OF FACT

The claimant began to receive AFDC in Santa Clara County in April 1985 on behalf of

herself and three children. She had been terminated from her employment with Atari/Warner Brothers and anticipated her former employer would pay her an accumulated pension fund.

Based on claimant's statements it is found claimant first notified the county that she anticipated receiving pension funds on April 23 at an eligibility interview and was advised by the Eligibility Worker (EW) to advise the county as soon as she received those funds.

On May 1, 1985, claimant received a check from Warner Communications for \$5,242.81 as her accumulated pension fund. The fund is entirely employer contributions.

On June 3, 1985, the next working day, claimant called her worker and was advised that her worker had been changed. On June 4, 1985, she called again and spoke to county employee P. M., to whom her case had been assigned. She asked how the money would be viewed and was told that Mr. M. did not know yet. On June 4, the claimant cashed the check. She had a cashier's check made out to herself and her mother for \$4,200 and a money order for \$400 made out to Consumer Credit Counselors for prior debts. She deposited the balance, \$636.81, into her checking account. She retained the check and money order in her possession. Claimant called Mr. M. again on June 7 which was his day off, and on June 11, when Mr. M. advised her that after consultation with his supervisor, pension receipts were categorized as "windfall earnings." The money could therefore be used to pay debts or living expenses and,

when claimant's property went below \$1,000, she could reapply for AFDC. She asked about paying back rent and was told that was allowed; she asked about paying a \$2,500 retainer fee for will contest action and, after further consultation, was told that too was a valid expenditure.

On June 14, 1985, claimant paid her lawyer a cashier's check for \$2,500 and paid her mother \$1,700 for back rent owed on her home. These expenditures are supported by receipts, and were made from the proceeds of the cashier's check for \$4,200. She also paid over the \$400 check to the creditor.

On June 20, 1985, claimant called Mr. M. to state that she had used all the pension monies to pay debts, and that she had all the receipts. She requested an appointment to determine her ongoing eligibility. The county worker left a message on claimant's call recorder that afternoon saying that the decision had been reversed and the money had been determined to be lump-sum income and that written Notices of Action would follow. On June 21, the claimant received the instant AFDC discontinuance notice.

A statement by county worker P. M. submitted into evidence at hearing is consistent with the claimant's evidence upon which the above finding is based, except that Mr. M. dates the conversation as on or about June 6 at which he, based upon consultations with his supervisor, advised the claimant that she would be ineligible until her resources were spent below \$1,000.

Based upon claimant's testimony it is found that claimant's disbursements of the pension funds in June were done entirely on reliance upon the advice from the county that to spend those funds would render her eligible for assistance, and that had she not been so advised, and had she been advised that the property was to be treated as a "lump sum," she would have retained a sufficient amount of those funds to live on for the period of ineligibility.

The county urges that its EWs were not aware of the correct disposition of retirement funds, since it had no specific instructions from the state as to how to deal with retirement payments.

CONCLUSION OF LAW

Manual of Policies and Procedures (MPP) Section 44-207.4 provides that lump-sum income is any income received by the family that is nonrecurring in regard to amount or source. The lump-sum income is to be added to the regular monthly income and if the amount exceeds the Minimum Basic Standard of Adequate Care (MBSAC), the county is to compute a period of ineligibility by dividing the MBSAC into the amount of the payment. The result of this division indicates the number of months for which there would be a period of ineligibility. When the period of ineligibility is two months or more, the county may either begin the period of ineligibility during the month following the receipt of the income or the payment month (which is two months later). The county is to discontinue aid and is to notify the claimant when the period of ineligibility is to expire. The

county is also to take the remainder from the division specified above and is to count that remainder as income in the month when eligibility is to begin again. The period of ineligibility may be shortened when the income has been used for emergency medical, shelter, clothing or food needs when such need results from sudden and unusual circumstances of a life-threatening nature. Under the above regulation, when the period of ineligibility is only one month, the period shall begin in the payment month and aid shall be suspended rather than discontinued.

MPP Section 44-315.4 provides that the Maximum Aid Payment (MAP) for four persons is \$666.

Pursuant to a stipulated judgment in Stephens v. McMahon, effective October 1, 1984, lump-sum income as defined by the above regulation does not include "windfall" lump-sum payments such as but not limited to personal injury payments, workers' compensation payments (but not to the extent that they represent back wages), gifts, inheritances, lottery winnings, damage claim settlements or insurance death benefits.

MPP Section 41-440.124 provides that eligibility for the state-only AFDC program shall not exceed three months in any 12-consecutive-calendar-month period. Pursuant to Section 41-440.12, state-only AFDC-U (Unemployed) benefits are appropriate if neither parent can meet the requirements of federal financial participation.

Canfield v. Prod, 137 Cal.Rptr. 27 (1977)

held that the Director of the Department of Social Services was precluded by the doctrine of equitable estoppel from denying retroactive benefits to a recipients of attendant care benefits. The case contains a thorough discussion of the doctrine of equitable estoppel and its application to government agencies. The decision notes first that four basic elements must be present in order to apply the doctrine of equitable estoppel:

(1) The party to be estopped must be apprised of the facts;

(2) He must intent that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended;

(3) The other party must be ignorant of the true state of facts; and

(4) He must rely on the conduct to his injury.

Additionally, in regard to the estoppel of government agencies, the decision held that application of estoppel will not be applied when to do so would effectively nullify a strong rule of policy adopted for the benefit of the public. Further, in determining whether estoppel is applicable to a government agency, the more culpable or negligent the agency or its representatives have been, and the more serious the effect of the advice on the claimant, the more likely the doctrine is to be applied. A permanent injunction in the matter of Lentz v. McMahon (Superior Court, San Francisco No. 813146, January 26, 1984)

mandates the application of equitable estoppel principles to state hearings.

Longshore v. County of Ventura, 25 Cal.3d 14 (1979) held that an equitable estoppel does not apply to enlarge a statutory or constitutional right. In that case a county employee relied upon promises made by his superiors that he would be compensated for overtime hours. The California Supreme Court held that such promises did not give rise to equitable estoppel because the county ordinances addressing overtime compensation provided no right to compensatory time off (or payment) until the time off was scheduled at the discretion of the county agency. Longshore's superiors had no authority to enlarge that right by representing in advance that compensatory time off would be scheduled in the future.

In All-County Letter No. 85-67 (June 20, 1985), the Director transmits clarifying information as a followup to some six previous All County Letters regarding the Stephens case and the Shaw v. McMahon case, which held that the lump-sum regulation cited above does not apply to state-only AFDC-U families. A one-parent Family Budget Unit (FBU) may be eligible for the state-only AFDC-U Program. In that program, even the parent of a child under six who is personally providing full-time care for the child is not exempt from work registration. The county may need to advise the recipient regarding work registration requirements.

The letter also discussed the Stephens case, and for the first time, specifically

states that "windfall" lump-sum payments include the employee portion of retirement benefits (received upon severance from a job, for example), but that the employer paid portion of retirement benefits is not a windfall payment and the lump sum regulations apply.

CONCLUSION

Based upon the above regulations and the All-County Letter, the county correctly determined that the claimant's retirement benefits, which consist entirely of employer contributions, constitute a lump sum within the meaning of the regulations. However, under the Shaw case, the county must allow the claimant an opportunity to become state-only AFDC-U eligible (i.e., register for employment) and grant the claimant three months of state-U eligibility. As to any period where eligibility under Shaw does not exist, the county is correct to determine a period of ineligibility under the lump sum regulations.

This conclusion is necessary because even though each of the four elements of equitable estoppel is met in the instant case, the doctrine cannot apply to enlarge the right of the claimant to AFDC as stated in the regulations. As for equitable estoppel alone, first, the county as agent of the state was or should have been aware that the claimant's employer-only retirement benefits were lump-sum income. Second, the county's intent in giving advice to the claimant at her request was so that she might act upon it, and it was with this intent that the county

incorrectly advised the claimant that if she spent the money down below \$1,000, she would retain AFDC eligibility. Third, the claimant was ignorant of the true facts of the situation, as evidenced by her repeated attempts to get a definitive answer from the county. Fourth, the claimant clearly relied on the county's advice in spending down the retirement payment as found above, and she suffers injury from having no assets to meet her needs during the period of ineligibility.

Despite the existence of all four elements listed under Canfield v. Prod, the county's action is sustained as to the months other than during which the claimant may be eligible for state-only AFDC-U. This is on the basis that the EW and his supervisor, by their information which turned out to be incorrect, could not enlarge the right of the claimant as to her entitlement for AFDC which is expressed in the regulations. The circumstances here are similar to those in, and controlled by, Longshore v. County of Ventura.

ORDER

The claim is granted in part and denied in part.

The county shall evaluate the claimant's case for eligibility for state-only AFDC for a three-month period and assist her as necessary and in accordance with the regulations to establish such eligibility, and pay aid as otherwise available for those three months.

In all other respects, the claim is denied.

AMICUS CURIAE

BRIEF

No. 86-978

Supreme Court, U
FILED

AUG 28 1987

JOSEPH F. SPANIOLO
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

SANDRA GARDEBRING, Commissioner of the
Minnesota Department of Human Services,
Petitioner,

vs.

KATHRYN JENKINS

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICI CURIAE THE STATES OF ALABAMA,
ARKANSAS, COLORADO, CONNECTICUT, FLORIDA,
GEORGIA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS,
KENTUCKY, LOUISIANA, MAINE, MARYLAND,
MICHIGAN, NEVADA, NORTH CAROLINA,
NORTH DAKOTA, OHIO, OREGON, SOUTH CAROLINA,
SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA,
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

No. 86-978

SANDRA GARDEBRING, Commissioner of the
Minnesota Department of Human Services,
Petitioner,
vs.
KATHRYN JENKINS,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICI CURIAE THE STATES OF ALABAMA,
ARKANSAS, COLORADO, CONNECTICUT, FLORIDA,
GEORGIA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS,
KENTUCKY, LOUISIANA, MAINE, MARYLAND,
MICHIGAN, NEVADA, NORTH CAROLINA,
NORTH DAKOTA, OHIO, OREGON, SOUTH CAROLINA,
SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA,
WISCONSIN, and WYOMING

Amici present this brief in support of Petitioner
pursuant to Rule 36.4 of the Rules of the Supreme
Court.

INTEREST OF THE AMICI

This case is one of dozens filed against States by welfare advocates across the country challenging various aspects of a provision of the Aid to Families with Dependent Children (AFDC) program known as the "lump-sum rule."¹ 42 U.S.C. §602(a)(17). This rule, and its application to the AFDC program, are already well-known to this Court and were the subject of its decision in *Lukhard v. Reed*, — U.S. — 107 S. Ct. 1807 (1987).

In the instant case, the Eighth Circuit has required Minnesota periodically to send all AFDC applicants and recipients a two-page written description of the lump-sum rule. Supposedly this notice is required by 45 C.F.R. §206.10(a)(2)(i), a federal regulation requiring states to publicize the AFDC program. Without this extensive and ongoing notice, the court says, Minnesota is barred from treating lump-sum income as required by the AFDC statute.²

¹ In August of 1983, the Center on Social Welfare Policy and Law published *AFDC: The Lump-Sum Income Provision--How It Works and Suggestions for Advocacy*. By the end of 1983 there were nine reported decisions concerning the lump-sum rule. Since then, the total number of reported decisions from state and federal courts involving the lump-sum rule has grown to 46. In addition to the instant case, there are reported decisions from Michigan, New Mexico, and Indiana, all discussed below concerning advance notice, estoppel, and the lump-sum rule. These cases were apparently spawned by the Center's memo. "An equitable estoppel argument may be strengthened by reference to 45 C.F.R. § 206.10(a)(2)(i) which requires the welfare department to inform applicants about their rights and obligations under the program." Center on Social Welfare Policy and Law, *AFDC: The Lump-Sum Income Provision--How It Works and Suggestions for Advocacy*, (1983), page 11.

² It should be noted that this case does not involve individual

... [Minnesota] having failed to provide adequate notice to Jenkins of the lump-sum rule, cannot properly invoke it against her. By failing to comply with the notice regulation, [Minnesota] failed to institute a legal change in its eligibility rules. [Citation omitted.] Jenkins' case must be governed by the prior policy towards lump sums.

801 F.2d at ____.

There are several aspects of this decision which strongly implicate State interests. First, this precedent provides welfare advocates a new means of blocking the implementation of federal statutory changes. In Minnesota, in Hawaii, and in other states, the "Slaughter defense"³ is now raised in administrative hearings, state court actions, and federal litigation, to insulate welfare recipients against a wide variety of federal eligibility rules of which they claim to have no knowledge.

Second, court orders requiring payment of AFDC benefits by states in contravention of the express provisions of the Social Security Act are a matter of

pre-termination notice. Welfare recipients have a due process right to receive pre-termination notice (and, if requested, appeal hearings) to guard eligible recipients against erroneous termination of benefits. *Goldberg v. Kelly*, 397 U.S. 254 (1970); 45 C.F.R. § 205.10(a)(4)(i). Each person affected by the lump sum statute here received a detailed individual pre-termination notice before the State took any action to terminate benefits. The adequacy of those pre-termination notices has not been challenged.

³ So named for the original Plaintiff in this case, Sharon Slaughter.

great concern to states. AFDC, the nation's largest welfare program, is "based on a scheme of cooperative federalism." *King v. Smith*, 392 U.S. 309, 316 (1968). Under this concept, States that participate in AFDC are eligible for federal reimbursement in up to 50% of their AFDC expenditures. 42 U.S.C. §603. In return, each State must administer its AFDC program in conformance with applicable federal statutes and regulations. *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith, supra*. Federal reimbursement is not available for any payments contrary to these statutes and regulations. In addition, such payments are deemed "erroneous excess payments." 42 U.S.C. § 603. When these erroneous excess payments rise above a certain fixed percentage, "quality control sanctions" can be imposed and federal funding is reduced. AFDC quality control sanctions have been imposed against 21 States since 1985. Substantial non-compliance with federally-established eligibility standards can result in total withholding of federal financial participation. 42 U.S.C. § 604.

The United States has taken the position in this and other litigation that it has discretion to decide whether it will provide federal reimbursement for court-ordered benefits. *Slaughter v. Levine*, 605 F. Supp. 1242 (D. Minn. 1985); see also, *Kozera v. Spirito*, 723 F.2d 1003 (1st Cir. 1983). Furthermore, the United States takes the position "that its interests are not 'implicated' by the adequacy of the notice claims asserted by the plaintiffs," *Slaughter*, 605 F. Supp. at 1250, and that it may decline to participate when court-ordered benefits are attributable to a state's administration of the AFDC program. *Chu Drua Cha v. Noot*, 696 F.2d 594 (8th Cir. 1982). Given the nature

of "cooperative federalism," States are rightly concerned whenever a court inhibits a State's ability to enforce congressionally-mandated eligibility limitations.

Third, the decision below establishes a precedent requiring States periodically to send lengthy written publicity of numerous federal eligibility requirements. Although the lump-sum statute may be distinguished from other eligibility requirements, the Eighth Circuit drew no such lines. Also, the decision articulates no standards for judging the adequacy of this publicity, assuming it is required. What is or is not "adequate" may only be determined after the fact by an appellate judge.

These substantial interests warrant the submission of this brief in support of Minnesota's efforts to obtain reversal of the decision of the Eighth Circuit—a decision which threatens the fisc of each state, invites havoc in the administration of their AFDC programs, and weakens public respect for welfare programs by allowing non-needy persons to receive benefits on the basis of "procedural errors."

SUMMARY OF ARGUMENT

Advance notice of particular eligibility rules is required by neither the Due Process Clause nor federal regulations. The Eighth Circuit has misread federal program publicity rules to create a right to advance personal notice of a particular eligibility rule, before the rule can be applied to a recipient. By doing so, it has created administrative nightmares for states who participate in AFDC and has frustrated the will of Congress, by allowing recipients to escape statu-

tory eligibility requirements of which they claim they had no prior knowledge. This new doctrine of "equitable estoppel" is contrary to the common law and is in clear conflict with this Court's prior decisions and the Supremacy Clause.

ARGUMENT

Advance personal notice of the lump-sum rule is required by neither the Due Process Clause nor by federal regulations. In *Atkins v. Parker*, 472 U.S. 115 (1985), this Court held that the Due Process Clause did not require advance written notice to individual food-stamp recipients of the specific impact of statutory changes upon them. Welfare recipients have "no greater" right to advance notice of legislative change . . . than any other voters." *Id.* at 125. The notion that the Due Process Clause requires prior personal notice of the lump-sum rule has been expressly rejected when raised in other courts. In *Jackson v. Gussinger*, 589 F. Supp. 1288 (W.D. La. 1984), Judge Shaw wrote in response to arguments identical to those made here:

The Fourteenth Amendment does not compel prior personal notice of statewide policy changes implemented pursuant to an agency's legislative rule-making function. *Accord, Cardinale v. Mathews*, 399 F. Supp. 163, 1172 (D.C. 1975); *Provost v. Betit*, 326 F. Supp. 920 (D. Ver. 1971).

589 F. Supp. at 1294. *See also, Rivera v. Illinois Department of Public Aid*, 476 N.E.2d 1143 (Ill. App. 1985), holding the Due Process Clause does not require the welfare agency to notify a recipient of the con-

sequences of receiving a lump-sum contemporaneously with his receipt thereof.

Although neither the District Court nor the Eighth Circuit relied upon the Due Process Clause as the source of any notice requirement, it is hard to imagine how the lower court could have found that the Secretary's regulation imposes a greater burden. The regulation does not expressly require detailed personal notice of any rule which might conceivably affect a recipient. 45 C.F.R. § 206.10(a)(2)(i) merely requires that:

Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement, individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program, and related services available, and the rights and responsibilities of applicants for and recipients of assistance. Specifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity.

This provision is part of the first three subparagraphs of section 206.10(a). These subparagraphs apply, not only to AFDC, but also to Old Age Assistance, Aid to the Blind, Aid to Permanently and Totally Disabled, and Supplemental Security Income. They implement statutory requirements that all individuals wishing to apply be made aware of these programs, be afforded an opportunity to apply, and be given a

decision on their applications with reasonable promptness. For example, the AFDC statute, 42 U.S.C. § 602(a)(10)(A) requires States to:

Provide that all individuals wishing to make application for aid to families with dependent children shall have the opportunity to do so, and that aid to families with dependent children shall, subject to paragraphs (25) and (26), be furnished with reasonable promptness to all eligible individuals. . . .

It is no accident that the first three subparagraphs of 45 C.F.R. 206.10(a) track this statutory language. Subparagraph (1) contains policies and procedures to guarantee that anyone who wishes to apply for benefits is permitted to do so. Subparagraph (3) announces policies and procedures requiring prompt decisions on applications. Sandwiched between these two subparagraphs is the notice regulation at issue here. Read in *pari materia*, and in light of the statutes which this rule implements, it is clear that subparagraph (2) is merely intended to facilitate general public knowledge of AFDC and other public assistance programs, so that individuals who might be eligible will be aware of them and the process by which they may apply.⁴ The fact that this regulation is primarily intended to publicize programs to the potentially eligible is further evident from the fact that it is expressly directed towards "applicants." The Eighth

⁴ Statutory provisions in other programs subject to this rule are virtually identical to the AFDC language. See 42 U.S.C. § 302(a)(8) [Old Age Assistance], 42 U.S.C. § 1202(A)(11) [Aid to Blind], and 42 U.S.C. § 1352(a)(10) [Aid to Permanently and Totally Disabled].

Circuit has ignored the plain language and common sense meaning of the terms used in this rule to find that it applies to both applicants *and recipients*, and to judicially enact its own notions of what is sound administrative practice.

This misconstruction of the rule, coupled with the Eighth Circuit's references to the "drastic consequences" of the lump-sum statute, make it obvious that the court simply seized upon a convenient tool to obstruct the implementation of a congressional decision which it considered unwise. The Eighth Circuit has ignored this Court's admonition in *Atkins*, that "what judges may consider common sense, sound policy or good administration, however, is not the standard. . . ." 472 U.S. at 125 n. 29, and that courts "do not sit to pass on policy or the wisdom of the course Congress has set." *Heckler v. Turner*, 470 U.S. 184, 204 (1985). It has also clearly disregarded the interpretation of the notice regulation by the agency that promulgated it. As the Department of Health and Human Services has made clear:

45 C.F.R. 206.10(a)(2)(i) does not even apply to AFDC *recipients* . . . more importantly, 45 C.F.R. 206.10(a)(2)(i) does not require states to provide either applicants or recipients with advance written notice of the mechanics and operation of any AFDC program rule, including the lump sum rule.

Brief for the United States as Amicus Curiae (on petition), p. 13. See also, *Lyng v. Payne*, — U.S. —, 106 S. Ct. 2333 (1986).

The only other court that has expressly interpreted this regulation is the Michigan Court of Appeals. In

Zarko v. Director, Department of Social Services, 375 N.W.2d 765 (Mich. App. 1985), the Michigan court squarely rejected the same rationale advanced by the Eighth Circuit, saying:

Acceptance of claimant's argument would require the department to inform all applicants and recipients of all statutes and regulations which could conceivably affect their right to assistance before any question concerning their right to assistance could arise. Under claimant's interpretation of the rule, the department would carry out its duty by furnishing applicants with a book of applicable statutes and regulations.

Such a procedure would scarcely be of more assistance to recipients than referring them to the nearest law library. The purpose of the regulation is best effectuated by providing practical assistance to recipients to deal with specific problems as they arise, not by giving recipients *pro forma* notice of every conceivable statute and regulation. We construe the regulation to require the department to initially inform applicants about general rules governing eligibility and client rights and obligations, to respond promptly to pertinent inquiries by applicants and recipients of specific rules relevant to matters reported to the department.

375 N.W.2d at 768.

No one suggests that the lump-sum rule should be kept a secret from welfare recipients; merely that a two-page notice sent every six months is excessive and unnecessary. It is true that publicity of the lump-

sum rule effectuates its purpose—namely to encourage recipients to budget their lump-sums rather than exhaust them before the lump-sum disqualification period has expired. Notice, however, is no panacea. It is hard to imagine what sort of notice would have prevented the irrational behavior of Respondent Jenkins who, with her husband, disposed of over 90% of their \$5,752 lump-sum *the same day* it was received, without a passing thought as to how it might affect their AFDC eligibility.

States face many practical problems should the Eighth Circuit's decision be allowed to stand. Although the decision is limited to the AFDC lump-sum rule, the notice regulation upon which this decision is premised encompasses all of the eligibility criteria of five separate public assistance programs. As Petitioner notes, federal AFDC eligibility regulations cover over 40 pages of the Code of Federal Regulations. States impose additional eligibility requirements. Although the Eighth Circuit seems to find that the lump-sum rule is unique because it is a departure from past practice and can result in prolonged ineligibility, neither of these factors is peculiar to this rule. AFDC is a complex and constantly changing program. Every rule can affect eligibility. Rules which could conceivably require the same notice as ordered here could include the step-parent deeming rule, the 185% income cap rule, the resource retention limits, the grandparent deeming rule, the automobile equity rule, the transfer of assets rule, the special rules affecting strikers, aliens, refugee sponsors, and several others.

The burden the Eighth Circuit rule places upon States is an impossible one. It forces welfare agencies

to notify recipients in writing of specific eligibility rules before the recipients engage in conduct from which they might arguably have refrained had they known the effect of the rules. For example, an individual's decision to participate in a strike might hinge upon knowledge of the AFDC striker regulation. Of course, an agency cannot know in advance whether an individual is contemplating a certain course of conduct and cannot know what notice to give. The only safe course of action is to give detailed notice of every conceivable regulation that might affect an individual's eligibility. Yet, providing every welfare family with the federal statutes and regulations would not suffice to meet this requirement. In fact, it would run afoul of another requirement that explanations be given in "simple understandable terms." This court has previously recognized that the Social Security Act "is among the most intricate ever drafted by Congress. Its Byzantine construction, as Judge Friendly has observed, makes the Act 'almost unintelligible to the uninitiated.'" *Schweiker v. Gray Panthers*, 453 U.S. 34 (1981).⁵

Of greatest concern is the Eighth Circuit's conclusion that "by failing to comply with the notice regulation, DPW failed to institute a legal change in its eligibility rules." The lump sum rule is an act of Congress. Congress has required states to disqualify lump-sum recipients for varying periods as provided in 42 U.S.C. § 602(a)(17). When Congress enacted this sta-

⁵ As the court also noted in *Schweiker*, Judge Friendly has described the medicaid statute as "an aggravated assault on the English language, resistant to attempts to understand it." *Freidman v. Berger*, 409 F. Supp. 1225, 1226 (S.D.N.Y. 1976), cited in *Schweiker*, *supra*, n.14.

tutory provision, it did not make its application contingent upon advance notice to those who might be affected. Even assuming that 45 C.F.R. § 206.10(a)(2)(i) requires some sort of personal advance notice of changes in eligibility rules, invocation of this rule cannot be a basis for obstructing the clearly expressed will of Congress. To do so puts the cart before the horse, and elevates administrative rules above the statutes which they supposedly serve. Whether or not Minnesota instituted a "legal change" in its rules is irrelevant. Congress makes the rules. *King v. Smith*; *Rosado v. Wyman*, *supra*. Congressional enactments are more than just limitations upon the conditions under which federal funding will be provided. States who participate in AFDC simply do not have the option to operate their programs in violation of federal law. Any doubt on that subject was erased by this Court many years ago in *Townsend v. Swank*, 404 U.S. 282 (1971). There, the majority rejected the dissenting view of Chief Justice Burger that the Social Security Act governs merely the dispensation of federal funds, and that state adherence to its provisions is not mandatory under the Supremacy Clause. If Congress had adopted a more liberal policy towards the treatment of lump sums, Minnesota certainly could not condition its implementation upon advance notice to recipients. AFDC recipients would rightly demand that Minnesota afford them the benefits of federal law.

The lower court's conclusion that "having failed to provide adequate notice to Jenkins of the lump-sum rule, [Minnesota] cannot properly invoke it against her," is entirely untenable. Clearly, it is not based upon the Constitution, the AFDC statutes, or the

AFDC regulations. It is a court-created doctrine of equitable estoppel which threatens to be a powerful weapon in the hands of welfare advocates to insulate their clients from the application of rules which Congress has mandated. It is well established that the government may not be estopped merely because it has failed to fully publicize statutory requirements. *Lyng v. Payne*, — U.S. —, 106 S. Ct. 2333 (1986); *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51 (1984); *Schweiker v. Hansen*, 450 U.S. 785 (1981). Compare *Watkins v. Blinzinger*, 610 F. Supp. 1443 (D. Ind. 1985) *Aff'd*, 768 F.2d 1293 (11th Cir. 1985) [recipients affirmatively misinformed that they could spend down lump sums and regain AFDC eligibility, but no relief granted due to Eleventh Amendment immunity], and *Muckey v. New Mexico Department of Human Services*, 694 P.2d 521 (N.M. App. 1985) [even if estoppel were available against the State, it would not apply where the recipient had not spent his lump sum in reliance on his case worker's failure to inform him of the consequences]. Affirmance of the "Slaughter defense" will seriously disrupt the ability of states to implement congressional changes to federal public assistance programs and is a repudiation of the principle announced by this Court that welfare recipients, like all other citizens, are "presumptively charged with knowledge of the law." *Atkins, supra*, at 125.

CONCLUSION

The decision of the Eighth Circuit portends manifold problems for the States in the administration of federally-assisted programs and is in clear conflict with the principles of this Court's prior decisions. For these reasons, *amici* respectfully request that this Court reverse the decision entered below.

August 28, 1987.

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